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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
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At Law and in Equity,
AND IN THE
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In Equity and in Error,
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The Cases in italics are from MSS. notes, or the Records of the Court.

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J U D G E S
OF THE
COURT OF EXCHEQUER,

**During the Period of the Reports contained in this
Volume.**



The Right Honourable Sir R. RICHARDS,
Knt. L. C. B.

Sir ROBERT GRAHAM, Knt.

Sir GEORGE WOOD, Knt.

Sir WILLIAM GARROW, Knt.



Sir S. SHEPHERD, Knt. Attorney General.

Sir R. GIFFORD, Knt. Solicitor General.

ERRATA.

In the name of the case, p. 205, for Bligh v. Berson, read Bligh v. Benson.

In the marginal note of reduction to the case of Noel v. Lord Henley, p. 242, third line from bottom, for subsidiary read subsidiary.

In the Index, p. 738, line 16 from bottom, for "against" read "by".

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
AND
EXCHEQUER CHAMBER.

EASTER TERM,
59 GEO. III.

1819.
29th April.

1817.

CRAUFURD and others v. The ATTORNEY-
GENERAL and others.

7th, 11th, 14th,
17th, & 24th
November.
17th, 19th,
20th, & 23d
December.

[*Case of the Dutch Commissioners.*]

THE plaintiffs in the present suit (by bill) were the three survivors, and the representatives of a fourth of the five persons who had been appointed Commissioners (usually called the *Dutch Commissioners*)


*Jurisdiction
(over Com-
missioners
of Audit.)*

Where the
Commissioners
for auditing
the public
accounts have,

in the investigation of accounts rendered by a public functionary, disallowed some of the accountants' charges, whereby he seeks to discharge himself of monies received, and surcharged him in other respects, this Court has jurisdiction so far as to examine and correct the principle on which that Board has proceeded in such investigation, if a case of just complaint in that respect be satisfactorily made out; but they will not determine a mere question of *quantum meruit*, as between the functionary and the Crown, in regard to the service performed and the charges made by the former. Vide *The Attorney-General v. Hoseason*, ante, vol. vi. p. 312.

The Court, therefore, entertained the present proceeding (by bill) against the Attorney-General, but dismissed it on the merits, which, in effect, were considered as imposing on the Court a duty to enter upon the enquiry of the sufficiency or insufficiency of compensation, which they held to be the peculiar province of the auditors, and not within
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missioners) under the act of Parliament of the 35th *Geo.* III. c. 80. enabling the government to commit to their care and management (for restoration, sale, or other advantageous disposal) the *Dutch* ships and their cargoes, which had been or should be brought into this country, or detained in the *British* ports, by virtue of an Order in Council of the 16th of *January*, 1795, and other subsequent orders.

The defendants were the Attorney-General and the assignees of *Brickwood*, (the other Commissioner) who had become bankrupt.

The bill prayed of the Court, that the plaintiffs and the other Commissioners, their colleagues, might

the scope of a reference to the Deputy Remembrancer, or an issue; and that a case of such manifest injustice had not been made out as enabled them to say that the audit ought to be reviewed.

Servants of the public appointed by commission under the Crown, without any stipulated remuneration, have no legal claim to specific compensation, whether the nature of their duties are analogous with well known employments, which, when engaged in between subjects, are remunerated by established rate *per cent.*, or otherwise, by acknowledged usage or custom (*ex. gr.* prize agents), or in other cases where the value of the services can be ascertained by such means. Such servants are wholly dependent, for remuneration, on the will of the Crown, or the judgment of those to whom competent authority may be, in that respect, delegated.

Interest (on public money).

Public functionaries must account for interest made by them, on any considerable balances in their hands, of the money, being the proceeds of public property sold by them, in pursuance of the duties of their appointment to such a charge; although they have necessary payments to make, in the course of those duties, if their instructions on their appointment direct them to pay such proceeds into the Bank, and point out a course of supplying themselves with money for their expenditure.

Quære, whether, in any case, public accountants may appropriate the interest made on large balances in their hands, as *matter of right*?

Evidence.


In a suit against the Crown, to which the assignees of a bankrupt, who, but for his bankruptcy would have been in the same interest with the plaintiffs, are made defendants, the bankrupt himself cannot be examined as a witness on behalf of the plaintiffs, although he has released the assignees, because the Crown is not bound by the statutes relating to bankrupts.

might be declared to be entitled to a commission of *5l. per cent. per annum*, on the gross proceeds of the sales of the ships, cargoes, wares, merchandizes, and effects, confided to their care; and possessed by them, and condemned—a direction that the auditors of public accounts might, on the audit of the accounts of the plaintiffs and their colleagues, allow such commission to them—and a declaration that the Commissioners, the plaintiffs, and their colleagues, were entitled to the sum of 42,504*l.*, admitted to have been received by them, for interest on sundry investments of money, whilst the same remained in their hands uncalled for, and to all such other sums as may have been made, for interest on the said balances; and that the auditors might be directed not to charge the Commissioners, on the audit of their accounts, with the sum of 42,504*l.*, or any other sum of money which might appear, on the audit of such accounts, to have been received by them, on account of interest on any investment of money, while the same necessarily remained in their hands unappropriated:—and in case the Court should be of opinion that the plaintiffs and the other Commissioners were not, under the circumstances, legally constituted Prize Agents to his Majesty, and were not entitled, as such Prize Agents, or otherwise, to a commission of *5l. per cent.* on the gross proceeds of the said sales, or to interest on the said balances; then that they might be decreed to be entitled to charge, in their accounts, the expences of their establishment, and all other their outgoings, in the execution of the duties imposed on them, and that all neces-

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sary enquiries might be directed, for the purpose of ascertaining the amount of remuneration to which they were entitled, on account of their time and trouble, in discharge of their judicial functions, and the several other duties imposed on them by the act, commission, or instructions [adverted to hereafter ;] and that all necessary directions might be given for such purposes, and that the plaintiffs and their colleagues might be declared to be entitled to such remuneration as, upon the result of such enquiries, should be found to be due to them, and to charge the same in their accounts.

The bill charged, in substance, the facts stated and relied on by the plaintiff's Counsel, and insisted on the several points made in the argument.

The answer of the Attorney-General (which was full on this occasion) submitted the topics urged in the defence.

The evidence consisted of admissions of the material facts — the various documents relied upon on either side — and proof of the general usage in regard to the remuneration of prize agency, the customary allowances for brokerage on insurances, &c.

[To prove that the balances which the Commissioners had retained in their hands, for the purpose of making payments, and satisfying successful claims on the property entrusted to their care, amounted to no more on any occasion, than the Commissioners had *bonâ fide* considered to be necessary

cessary for those purposes, the plaintiffs proposed to read the depositions of *Brickwood*, one of the Commissioners, who, having become bankrupt, was not a party to this suit, but by his assignees, to whom he had signed a release.

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On the part of the defendant, it was objected, that as the Crown was not bound by the statutes regarding bankrupts, the bankrupt could not be admitted as a witness against the Crown; because, although he had released the assignees, he still had an interest to diminish the claim of the Crown, and augment the charges of the Commissioners.

On the other side, it was urged, that he could have no interest in this case, at least, because it was admitted, that the balance was on the whole, in any event, in favor of the plaintiffs, the only question being the amount of that balance—
 but

The Court (consisting of *Thomson*, Lord Chief Baron, and *Graham* and *Richards*, Barons,) held that the witness was not admissible, because, as in the case of subject parties, a certificate would be necessary to restore the bankrupt's competency, so as there can be no discharge by certificate against the Crown, a release of the assignees, as to any surplus which might be ultimately recovered, was not sufficient to render him competent.

Depositions rejected.]

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The substantial object of the suit was to bring under the revision of this Court the principles on which the auditors of public accounts had founded their rule in investigating the accounts rendered by the Commissioners, and in refusing allowances, and making surcharges in respect of the sums claimed by them as a remuneration for their services in the course of their duty. The Commissioners, in their discharge as to the money which had come to their hands, had charged the Crown with a commission of *5l. per cent.* on the *gross* proceeds arising from the sale of the ships, &c. with the disposal of which they had been entrusted in *quality of Prize Agents*—and they claimed to be entitled to retain, as matter of right, a sum of 42,000*l.* and upwards, made by them by interest on balances in their hands. The auditors had disallowed the claim of *5l. per cent.* on the gross proceeds, and calculated it on the net proceeds, making thereby a deduction of 27,000*l.* and they had surcharged the plaintiffs the sum made by interest, as being part of the proceeds of the sale of the property, which it was their duty to render as available as they might. The propriety of the conduct of the auditors, in assuming to themselves a power so to take the account, and the jurisdiction of this Court to interfere with the discretion of the Board, formed the main question now brought before the Court by the present proceeding.

The nature and history of the appointment of the plaintiffs, and the political events which gave rise to it, being of material importance to the merits

merits of their case, and the foundation of the principal arguments; they were therefore introduced into the bill, and stated to the Court in detail, and are succinctly as follows :—

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About the end of the year 1794, and the beginning of 1795, (the *French* having obtained a footing and very considerable influence in the *Netherlands*, and the United Provinces), the *British* Government, with a view to encourage a friendly disposition towards this country in the *Dutch* people and to facilitate a commercial intercourse, by an Order in Council permitted a general importation of merchandize direct from the ports of the United Provinces to those of this kingdom; and other orders were made with the same object. War between the two countries being soon after considered unavoidable, orders were issued to the commanders of the King's ships and privateers, to bring compulsorily into the *British* ports all *Dutch* vessels bound to or from *Holland*, in order that they and their cargoes might be detained, provisionally, and that speedy restitution should be made of all such cargoes found on board, or the value, as should appear to belong to subjects of *Britain* or of allied or neutral Powers. In consequence of those several orders, many ships with cargoes came voluntarily to this country; many were brought in by the King's ships, and many at that time here were detained. The importation of *Dutch* merchandize having been previously prohibited by acts of Parliament; an act was necessarily passed in *May*.

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1795, (35 Geo. III. c. 80.)*, sanctioning the Orders in Council. By the 21st section his Majesty was empowered, with the advice of the Privy Council, to grant a commission to three or more persons, authorising them to take such ships and cargoes under their care and management. A commission was accordingly issued to the plaintiffs and their colleagues, and they received instructions † on their appointment, in respect of the performance of their duties. War was ultimately resolved on by this country, and general letters of reprisal were issued (15th *September*, 1795) against *Holland* by the *British* Government, a measure equivalent to a declaration of war. Instructions were also, on the 10th of *October*, issued to the Admiralty, which, after reciting the act of the 35 Geo. III. and the commission thereon, and the letters of reprisal ordered the Court of Admiralty to proceed to the adjudication of such ships and goods of which possession had been or should be taken by the *British* Commanders, as should be proceeded against by the Advocate-General on behalf of the King, in order that the same, being the property of the United Provinces, or their subjects, might be considered as good and lawful prize, *reserving nevertheless to the said Commissioners the care and management thereof, as well before as after final adjudication, according to the provisions of the said act.*

* This act, and its provisions, are fully detailed in the judgment delivered by the Lord Chief Baron.

† The material tenor of which is also particularly stated in the judgment.

In

In the early part of the same year, before war was actually declared, Capt. *Essington* had captured seven *Dutch East India* ships on their passage from *St. Helena* to *Holland*, and carried four of them into the *Shannon*, in *Ireland*, as capture; and he employed persons to take possession of them as Prize Agents;—but that proceeding being considered adverse to the King's rights, an Order in Council was issued, asserting his Majesty's right to the ships, and appointing agents for the care and disposal thereof, and ordering that the *Dutch Commissioners*, by name (not describing them as Commissioners) should be *the agents* on behalf of his Majesty, for the care and management of the said ships and their cargoes, whereof all persons concerned were to take notice.

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The Commissioners, in consequence of their appointment, afterwards formed an establishment for the management and conduct of the business, opening an office, employing clerks &c. and transacted official business to a very great extent. They had, of their own accord, insured the ships taken by Captain *Essington*, on the intelligence of his arrival in *London*, to the amount of 150,000*l.* and were afterwards engaged in a very protracted litigation with the underwriters, in consequence of their claims for the loss of some of them on their course to *Ireland*, in which they ultimately recovered.

By a subsequent Order in Council (3d *May*, 1809) the plaintiffs were ordered to make up their accounts, and transmit them to the office of the Privy Council,


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Council, with their vouchers, that they might be laid before the Lords of the Treasury, who were to refer them to the Commissioners for auditing the Public Accounts. That order directed the plaintiffs to charge in such accounts a commission of *5l. per cent.* upon the *net* proceeds of each ship and cargo, they paying thereout the expences of their establishment. It also ordered the Commissioners to give credit for sums received by them for interest on the balances in their hands.

Upon the delivery of their accounts by the Commissioners, pursuant to the directions of the Order in Council, accompanied with a protest against their being held to be bound by it, the Lords of the Privy Council entered into a minute and elaborate enquiry as to the principle upon which those accounts ought to be taken. They thereupon resolved, that it was fit that the Commissioners should be allowed the expences of their establishment, and declared, that if the Commissioners considered themselves entitled by law to the commission of *5l. per cent.* upon the gross proceeds, or to the interest made by them on balances, every facility should be given to their taking the opinion of a court of justice upon the legality of their claim; and the Treasury, in consequence, directed that steps should be taken, on the part of the Government, to procure such decision. A correspondence then took place, wherein the Commissioners stated to the Council that there would be difficulties in ascertaining what were the net proceeds according to the view of the Privy Council, for that considerable payments had been made for
various

various purposes, to the crews of vessels, compositions to the *East India Company*, for the home consumption of *China* and *East India* goods, and expences to captors, which had occasioned them as much trouble as their other duties; they therefore desired to know what was to be considered as net proceeds. They were at first answered, that nothing was to be considered net proceeds, except what had been rendered available to Government. The Lords of the Council afterwards relaxed that criterion, and decided, that as to all which had been realized or restored to the claimants after sale by the Commissioners, the commissioners should charge therein commission on the net proceeds of the sales, as well as on the monies paid over to Government. The Commissioners, however, still insisted upon their right to charge commission upon the gross proceeds, and to retain the interest of monies in their hands; and in their letter to the Secretary of the Council, expressed a hope that their Lordships would reconsider their order of the 3d of *May*. Upon the delivery of the accounts, the Privy Council took the pains to enter very particularly into them; and a minute of Council was drawn up, expressing, as the result of that investigation, that their Lordships had taken the Commissioners' letter and all the circumstances into full consideration, and referring minutely to the various authorities under which the Commissioners were appointed, they observed, that under the circumstances, it appeared to them difficult to determine what remuneration ought to be made to the Commissioners, especially as they appeared in the insurances effected


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effected by them to have described themselves only as "Commissioners for sale of *Dutch* property," that being their usual style and firm of dealing, and to have blended the whole conduct of their duties, under all the authorities vested in them, in one general account as Commissioners; and accordingly had paid large sums of money (being the produce of the sale of the ships and cargoes placed under their care and management, and of the insurances effected by them, on which they had recovered at Law) into the *Bank of England*, according to the directions of the act under which they derived their joint authority, as expressly recognized and preserved by the instructions to the Court of Admiralty. On the whole, their Lordships were of opinion that the Commissioners, in making up their accounts, ought to consider themselves as *Commissioners* acting under the authority of their commission so affirmed and preserved, and as entitled to a remuneration in that character; although in determining the amount of the remuneration to be received by them, it might be fit to take into consideration that in some respects they should be deemed to have acted also as *Prize Agents*, as where they had actually saved the charge of agency usually allowed — and that they ought not, in their accounts, to charge commission either on the gross proceeds, according to the practice before the passing of the act of the 45th of the King, or on the net proceeds under the provisions of that act. They then suggested that some middle course should be adopted; for that they ought not to have so much as five *per cent.* upon the gross proceeds, nor so little

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little as five *per cent.* on the net proceeds ; but that where they had saved the Crown the expence of Prize Agents, and had performed other duties, regard ought to be had to the nature, magnitude, and efficiency of their services — that they should account for any interest which they might have made of money retained in their hands, although a power was necessarily given to them to determine what should be necessary for the discharge of their duties — that they ought, on the other hand, to charge in their accounts all the expences incurred by them in executing their commission, which, considering themselves as Prize Agents, they had not done — and that their expences, with proper vouchers, should be submitted, with their accounts, to the examination of the Auditors.

The Board of Audit, however, persevering in the disallowances and surcharges which they had made, the plaintiffs now resorted to this Court, praying the interference sought by the present bill.

Wetherell, Nolan, Jennings, Richardson, and Combe, of Counsel for the plaintiffs, and *Carr* for the defendants, the assignees of *Brickwood*, who were in the same interest as the plaintiffs, supported the prayer of the bill.

Under these circumstances, they contended in substance, that the Commissioners were, in point of fact, to all intents and purposes Prize Agents, and entitled to all emoluments and profits attached to the duties of such employment, which
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was by custom and usage, until the 47 Geo. III., established to be 5*l.* *per cent.* on the *gross* proceeds — and that although called Commissioners in the act of Parliament, in the enumeration of the duties prescribed to be performed by them were to be found all the business that was usually performed by Prize Agents: it was true there are other and higher duties to be performed, and more extensive services to be rendered by them as Commissioners; but that (they urged) so far from operating to diminish, ought to have the effect of augmenting the remuneration — that the term by which the Legislature had chosen to designate their office, could have no effect in changing the nature of their employment, nor should shut them out from the advantages of it to themselves — that if they were not in the first instance constituted Prize Agents by the act of Parliament and the commission under it, they certainly were, as soon as by the declaration of war the ships had become prize as between the Belligerents; for the nature of their employment was then unequivocal, and the state of the property under their care had become wholly changed and altered — the property had then become prize, and was shortly afterwards so adjudicated, and the Commissioners then became under the instructions, the duly constituted Prize Agents, having the undisturbed and sole management and sale and disposal of the ships and cargoes. They observed that the plaintiffs were persons of great responsibility, and that responsibility was subject to the consequences of their administration of the charge: and that the appointment was altogether, in its nature, rather

rather a private than a public employment, for although the proceeds arising from their disposal of the ships and cargoes, were directed to be paid into the *Bank of England*, on account of his Majesty, they belonged to him individually and privately as Admiralty droits, and not as public money, payable into the *Exchequer*.

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They urged, that so obvious was it that they were, and had been considered to be Prize Agents by Government, that they had, in respect of the *Dutch ships in Ireland*, been actually so termed in the document by which they were appointed : and that it was a mere subterfuge to make a distinction between the duty, and the name of the office, for the purpose of abridging the remuneration. As well (they argued) might it be said that a person who should be appointed a Commissioner to purchase and sell stock for his Majesty, would not be in fact a broker, as that these plaintiffs were not, under the circumstances, Prize Agents, because they had been styled Commissioners. The Lords of the Privy Council had not disputed the plaintiffs having acting as Prize Agents on the behalf of Government, and they were admitted to have saved to the King, by so doing, the expence of employing other persons in that necessary capacity, which his Majesty must have done as soon as the property had devolved on and become vested in him *jure coronæ*, by the actual commencement of hostilities. There was no distinction, they urged, between the case of the Crown, and of the subject, in this respect, giving to the King a right to refuse to the character

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racter in which he employed an individual, the incidental consequences which would essentially belong to it in the instance of a subject, and that there was no foundation for saying that being employed by the King, does not entitle the agent to the remuneration which, if employed by a subject, he would have a right to demand.

They then submitted, that if the proposition now contended for by them, was not sufficiently supported by principles of law and reason, and by the general understanding of mankind, there was to be found a decision on the point, on the authority of the highest Court in this country, which had already established that these very plaintiffs were, in point of legal construction of the nature and object of their appointment, the duly constituted Prize Agents of the Crown. That was in effect decided in the case of *Lucena v. Craufurd* (a). It was there determined — on the question of whether there was a sufficient interest in the Commissioners to sustain the verdict that had been taken on the first count of the declaration, which averred the interest to be in the Commissioners — that after the commencement of hostilities they were Prize Agents. In the judgment delivered in that case in the Court of Error, the majority of the Judges considered that there was a sufficient interest, the others that there was not. When that case was afterwards carried up to the House of Lords, the second and third questions propounded to the Judges were, what legal interest the plaintiffs as Commissioners

(a) 2 N. R. 209.


had under the act of Parliament, to entitle them to take possession of and to manage (&c.) the property as such Commissioners — and whether, under the circumstances in evidence, they were duly and effectually constituted agents on behalf of his Majesty, for the care &c. of the *Dutch* ships carried into *Ireland*; and whether, after the declaration of hostilities, their authority was to be considered in law as vested in them as Commissioners, by virtue of the act and commission: or as agents appointed by the Orders in Council. Upon those points there was a difference of opinion, five of the Judges considered that the plaintiffs had an interest as Commissioners, holding that the power of the Commissioners was much more extensive than that of Prize Agents; for the power of a Prize Agent extends only to the taking care of the ship, and managing it during the suit in the Admiralty Court; whereas these Commissioners performed much more extensive duties. "The Crown (said those Judges) appointed them Prize Agents, for the purpose of giving them as much power over the ships in question, in the ports of *Ireland*, as they had under the original commission in this kingdom, and to enable them to bring the ships within their jurisdiction as Commissioners." Their opinion, therefore, that the plaintiffs had an insurable interest as Commissioners, was founded upon the ground that they had a much more extensive appointment than that of mere Prize Agents; for they said, that, "In the ordinary course of proceedings, Prize Agents would be appointed for the management of these

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ships; but by these instructions the King, without conferring any new power on the Commissioners, reserves to them the care and management of the ships." The other Judges were of opinion that their function as Commissioners would not sustain their interest, because, till hostilities had commenced, the Crown had no right to the property, but when war had been declared, they appear to have considered that the plaintiffs were to be regarded as Prize Agents. To the third question the five first Judges answered, that "the plaintiffs were duly constituted Prize Agents of the ships sent into *Ireland*, and that they exercised their authority in *Ireland* in that character; but that their appointment as Prize Agents in *Ireland* was not inconsistent with, nor in any respect intended to revoke or abridge their power as Commissioners in *England*, and that as soon as the four ships mentioned in the declaration, were brought by the King's order into the ports of *England*, their authority as Commissioners attached upon them;" and they relied upon the reasons given in answer to the last question. The other five Judges, however, thought that the plaintiffs were duly constituted Prize Agents of the captured ships, and that their authority to continue such ships under their care and management, as well in *Great Britain* as in *Ireland*, was vested in them as Agents appointed by Order in Council, and not as Commissioners under the act. That answer they considered as following of course from the opinion before given—that after the commencement of hostilities, the plaintiffs could only act under

under a new authority derived from the Crown, and not by virtue of the act of Parliament: being of opinion that they continued to be Prize Agents, but necessarily also to act as Commissioners; and holding that the reservation contained in the Order in Council, merely limited their authority as Prize Agents by their power as Commissioners. The same view of it is clearly expressed by Lord *Eldon* (having previously stated that it would be necessary to the question, to determine the real character of the Commissioners), was ultimately adopted by the House of Lords. His Lordship says, "The moment hostilities took place, the property was condemned as prize. The power of the Commissioners could never have attached upon it in the hands of the King, nor could they have had any authority to deal with it, unless the King had thought proper to grant it to them. With respect to the ships in the ports of *Ireland*, he expressly constitutes them Prize Agents;" (so that, they observed, there was the highest authority for saying that the not calling them Prize Agents cannot be the foundation for an argument that they are not, in fact, Prize Agents) "and" (continued his Lordship) "with respect to those brought into this country, and condemned, he authorizes them to deal with the proceeds in the manner they had been instructed to deal with them as Commissioners, and according to such instructions as they should thereafter receive. But I state it with great confidence, though, I hope, with proper humility, as my clear opinion, that after the declaration of hostilities, the Commissioners neither did deal, nor had a

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right to deal with the property as Commissioners." It was, therefore, the opinion of his Lordship and the House of Lords, that as well as to the *Irish* as to the *English* ships, their authority was revoked, unless it was renewed to them by the Government: and that the Commissioners, under the appointment of the King, afterwards united both characters. "His Majesty, having a title to it, makes them his Agents, and points out to them in what manner they shall exercise that agency, directing, that it should be in the same manner as if they had derived their title under the commission, and not under their special appointment as Prize Agents," directing them, in substance, to exercise their authority as they had exercised it under the act of Parliament; but his Lordship was of opinion that they had no power under the act, or the commission, but solely under the appointment of the Crown, contained in the reservation, and which constituted them Prize Agents. Therefore, upon authority, as well as upon principle, and the circumstances of the case, they submitted, it was clear, that the plaintiffs did sustain the character of Prize Agents: and if so, that they were entitled in law and in justice to the remuneration attached to Prize Agency by custom and the universal assent of the mercantile world.

If, however, on the other hand, the Court should hold that the plaintiffs are not to be considered as Prize Agents, and entitled to their commission upon the gross proceeds; they contended, according to the prayer of their bill, that as Commissioners of the Crown the plaintiffs
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were bailiffs, and that all fair expences incurred by them would be a charge that they would be clearly entitled to make against their principal, every agent being entitled to charge his fair expenditure, unless custom prevent his so doing. The Commissioners (they stated) had necessarily been compelled to have an extensive establishment of clerks and offices for the conduct of their business, reaching to every out-port of the country; the expences of which establishment for such a period of time as their commission necessarily lasted in consequence of litigation (above twenty years) had exceeded 21,500*l.*: and the Privy Council admit, that if they are not entitled to commission upon the gross proceeds, as Prize Agents, but on the net proceeds as Commissioners, they are entitled to their necessary expences; they therefore urged, that the Auditors, who were bound to obey the orders of their superiors, had no right to surcharge the plaintiffs the difference of the amount of the commission upon the gross proceeds, and still less to refuse to allow the expences, contrary to the express recommendation of the Privy Council. Then the difference upon the net or gross proceeds, amounting to 27,000*l.* and a fraction, and the expences of their office being 21,500*l.* the difference to be disallowed would be only 5,500*l.*; therefore, if these gentlemen are not Prize Agents, they are entitled to be allowed the expences of their establishment, so that that surcharge, instead of being 27,000*l.* and upwards, ought to have been only 5,500*l.*

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They next proceeded to the consideration of
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the question of interest, and the charge made against the Commissioners of 42,000*l.* and upwards, admitted by the Commissioners to have been interest made by them on monies remaining in their hands, but not unnecessarily, nor, indeed, was it even suggested by the Auditors to be unnecessarily remaining in their hands; and which they insisted were mere floating balances, subject to pending claims in a constant course of daily determination.

They observed, that the reason upon which the Board had made this charge, as stated by themselves, in the document put forth by them on the subject, was upon the general principle of all public accountants being accountable for all sums of money that "shall at any time accrue to them, and be received by them, or by any person or persons on their behalf, by virtue of their office or employment in the public service, other than such as they shall be duly authorised to receive and retain as a remuneration for such office or employment;" and they refer to the Order of Council, of the 3d of *May*, 1809, directing these accountants to give credit in their accounts for all sums received by them for interest, on any balances they have at any time had, or may now have in hand, as conclusive with regard to the surcharge of that sum for which they have not given credit to Government in their account. But that they denied to be the law; and consequently, therefore, that any ground was laid at all for charging the plaintiffs with interest to the amount of 42,000*l.*, submitting, that before the
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audit acts, as those acts and their provisions necessarily prove, all public accountants were considered entitled to the interest on balances of public monies in their hands; so that they were ready at all times to answer the demands of the public, when made upon them — that there was nothing, in those statutes, or at common law, which could operate to render these Commissioners accountable to Government for the interest on monies necessarily and properly remaining in their hands, so that they were not defaulters, but prepared, when called upon to pay it over, or to account — and that if they were not ready to pay at the time when balances were in their hands, it appears matter of great doubt, whether, even in that case, they could be so charged, as coming within those acts, because they do not make provision for a case like the present, where money has not been improperly retained in the hands of the accountant, and here that is not suggested. Those sums were, in fact, balances which the Crown could not at any time have demanded or taken from the plaintiffs; and which the Crown had not, at any time, a right to call for; because this 42,000*l.* was the interest of money necessarily kept in their hands to answer expected successful claims, always on the point of determination, sometimes to an amount of considerable magnitude. Whether, therefore, the balances in the hands of the Commissioners, which were retained by them for the various purposes and duties enumerated and imposed by the several sections of the act authorising their original appointment, resulted from money kept in their hands, and produced by the

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disposal of the property : or whether it had been advanced to them by draft, after it had been paid by them into the Bank, the principle of keeping the interest which it should produce would be precisely the same. However the principal sums might come to them, whether regularly or irregularly, the interest would belong to them, which should be made of it while necessarily under their accidental controul. All that could be required of them would be, to be able to shew that they never kept more than they calculated to be enough to answer the claims against them; and it is not pretended that those calculations were not *bonâ fide*. They submitted, as a further objection to the *Crown* claiming the interest made on such balances, that during the time they remained in their hands, they formed no part of the public money, but were *in medio* between the *Crown* and the claimants; and it depended on the adjudications of the *Admiralty* whether it belonged to the one or the other. They also insisted, that independently of these acts of Parliament, public accountants were not answerable to Government for the interest on monies in their hands, as of common right—that the *Crown* must shew some ground for demanding interest; and that very few cases could occur (unless a special bargain was made) prior to this act, in which the *Crown* would be entitled to it—that the law does not require, that, in every case of interest made by a public accountant, it is to be paid over to the public; unless *he* can shew some reason why he should keep it; on the contrary, he may retain it, unless the auditors can shew a reason why

why he ought not, provided he be always ready to make necessary payments. They submitted, therefore, that the plaintiffs were entitled to render the balances productive, which they must do upon their own risk and responsibility, they being liable for all the securities on which they may invest it; and that they are entitled so to do, as an incidental emolument attached to their situation, unless some law or reason to the contrary can be shewn. On that part of the argument, they cited the following cases from *Viner's Abr.* tit. *Account*, [O.] pl. 12. p. 162, and *Roll. Abr.* 125. pl. 12. "If a man receives money of *J. L.* to deliver to *J. D.*, as a messenger, in an account against the bailee, he shall be discharged before auditors by tender in Court of the principal sum; for he is not to account for the profit thereof in the mean time, though he hath detained it in the mean time; for he did not receive the money to merchandize, but only to deliver over." and *Ib.* pl. 13. "So, if my bailiff of my manor receives the rents of my tenants, and retains them for two or three years, yet, in a writ of account, he is not to account for the profits coming therefrom in the mean time; for he had not my warrant to merchandize with them, or to gain or lose." *Fitzherbert, Nat. Brev.* tit. *Writ of Account*, p. 117, in notia. And they submitted, that unless there were any thing in the King's prerogative which distinguished the cases, the plaintiffs were, with regard to the Crown, in the same situation as receivers in the Court of *Chancery* are, with respect to the infants, or the married women, on whose behalf they are appointed, who never pay over

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over balances till three months, and sometimes half a year after they are due; and they have a right to make interest of the money whilst remaining in their hands, without being accountable for it to the Court, or to the persons for whom they are bailiffs; and that is a part of their remuneration. They are not trustees; and therefore have no *cestui que trust*, to whom, as trustees, they would be accountable for the fruit of the employment and use of the principal.

On the argument expected to be founded on the fact, that the act of Parliament contains a peremptory direction to pay over all sums forthwith to the Bank of *England*, they insisted, that it was clearly necessary for the plaintiffs to keep money in their hands to satisfy the claims to be paid by them: and that it must be intended, that they are directed to pay over to the Crown only the clear ultimate balance, after the discharge of all demands — or the net produce, which, being once paid into the Bank, was there to remain, subject to such orders as his Majesty, with the advice of his Privy Council, might think fit to give thereupon: that is, until such *final* orders as might be made, whether they should be, in the result, to pay it to the parties to whom it should be adjudged to belong, or to his Majesty, in right of his Crown — for that it could not be meant that the Commissioners were to apply, from time to time, to his Majesty in Council, for permission to draw a draft upon the Bank, to meet current expences; such an interpretation would be most inconvenient, and such as no man, whether merchant or lawyer, could possibly suggest,

suggest, as the fair construction of the Legislature. The Commissioners are to be furnished with money in the first instance, to pay off the crews of detained vessels, if the demand should appear to them to be just. Money was to be issued to them on account; but they were to take care that all money which should be so issued to them should be replaced out of the sale of the ships and cargoes, as soon as they should be sold. It is to be inferred, therefore, that those payments to the crews were to be defrayed, by the Commissioners, out of monies to arise from sales, as soon as they should have become productive; and that money, which had been advanced to them by the Treasury, they were, in the first instance, to replace, as soon as there should be money enough received by them from the sale of the ships and cargoes; and they were not to replace that money by paying it into the Bank, but by paying it to the Treasury, who had advanced it.

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The first act of Parliament, providing for the payment of interest by accountants, they observed, was the 39th & 40th of *Geo. III.* c. 54., and that only two cases are provided for by that act. After reciting the expediency of charging public accountants with the payment of interest upon public monies received by and *due* from them, it enacts, that in all cases where any person employed in the collection or receipt of any part of his Majesty's revenue, shall, from and after the passing of the act, die, or go out of office, being indebted to his Majesty at that time, in respect of his said office, to the amount of 500*l.* or upwards,

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wards, the proper officer is to charge him, in case of death, from twelve months after, or, in case of going out of office, from three months after, with interest at the rate of *5l. per cent. per annum*, upon the whole of such balance due from him. That provision, they submitted, clearly cannot apply at all in this case. These plaintiffs had not died, nor gone out of office, nor is there any charge made upon them upon those grounds; but the *42,000l.* is the interest made by them while their functions were in full exercise. The act then gives to the party aggrieved a right to apply to this Court by motion, who shall give him relief in a summary way, if it thinks it just and reasonable.

The fourth section provides, "that upon any audit which shall take place after the passing of the act of any ordinary or extraordinary account, where it shall appear to the Commissioners for auditing the public accounts, that any public accountant is indebted to his Majesty, upon the balance thereof, in the sum of *500l.* and upwards, *such account not being an account current*, it shall and may be lawful for the said Commissioners, at their discretion, to charge the said accounting party with interest upon the whole or any part of the said balance, for such period of time past, and at such rate of interest, as they shall deem to be just and reasonable, so that the said rate of interest do not exceed *5l. per cent. per annum*; then they are required to give notice; and a further charge is to be made in the interval between the statement of the account and

and the declaration. That case also does not apply to the present circumstances, so far as relates to the 42,000*l.*; for, at the time when the 42,000*l.* was made by these Commissioners, the account was undoubtedly an account current in the strictest sense of those words; the parties were receiving sums of money on the one side, and making payments on the other; and the interest, to the amount of 42,000*l.*, which was made from the time when the Commissioners were appointed, was made at a time when they were retaining in their hands monies for the purpose of meeting the various disbursements, which they were bound to make, and the numerous and large claims daily established against them, and they were also receiving the monies arising from the sale of ships and cargoes—and that constituted strictly an account current during the whole of that period. That section must be taken to apply wholly to a case in which the auditors find a party presently indebted, and indebted upon an account final, not an account current, as in the case of a collector of taxes, who is to receive monies, and pay the amount, whatever it may be, over to his immediate superior, or to the Exchequer, and such a person cannot be said to be indebted upon an account current.

The other act of Parliament, which carries the responsibility of public accountants still further, is the 47th Geo. III. sess. 2. c. 39. It recites the 39th and 40th of the King, and that it is just and reasonable that persons who *have improperly and unnecessarily*

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necessarily retained in their hands *large balances* of public money, should, *in certain cases*, be charged with interest upon such balances; but no power is given by the said act to charge such persons with interest, except in the cases that are particularly specified in the said act, (which seems to assume pretty clearly, that, but for that act, parties could not be charged with interest, but upon special grounds arising from contract) it is therefore enacted, that in all cases in which it shall appear, upon the examination or audit of public accounts, that *balances* of public money have *improperly* and *unnecessarily* remained in the hands of the accountant, it shall be lawful for the Commissioners for auditing the public accounts, and all other officers who shall be charged with the duty of examining and finally passing such accounts, and they are thereby authorized, in all cases in which it shall appear to them to be just and reasonable, to charge such accountants with interest upon the whole or any part of the said balances, for such period of time past, and at such rate, not exceeding *5l. per cent. per annum*, as they shall deem reasonable, although it shall appear that such accountants were not indebted, at the time, or in the manner mentioned and specified in the said recited act. Then it authorises them, in certain cases, to make annual rests in the account, and to give notice to parties charged, who may appeal to this Court in a summary way, who shall make such order thereupon as justice shall require; and the several persons whose duty it is to make up such accounts shall govern themselves accordingly.

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Thus it appears, that the former act did not extend to this case, but only to cases where the money remained as a balance in the hands of the accountants after the time of their having died or gone out of office; and then the last act makes a further provision for the case, where the money had been improperly withheld generally, enacting, that where that should be the case, it might be lawful for the Commissioners, in their discretion, to charge the party with interest, subject however to the supervision of this Court.

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In this case, they observed, it had not even been charged, that the money upon which the interest arose was at any period of time improperly or unnecessarily withheld by the plaintiffs; for the charge is not made against them upon that ground, but merely because they did in fact make it. But they contended, that the fact of their having actually made it productive of interest, without proof of the retainer of the principal, having been unnecessary and improper, does not, in the smallest degree, affect the question of right. It is to be supposed, that all persons who have large sums of money in their hands, which they are entitled to hold, will make them productive of interest; and it is in cases only where such balances have been improperly withheld, that the party is by this act made chargeable; and there is no law, common or statute, which, in the case of public accountants, generally requires that they shall not retain interest made upon money

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money in their hands, whilst they at all times have it ready for the exigencies of the service entrusted to them; and if they have it, and perform those services, and the money is duly paid over when required, they perform legally, as well as morally, their duty, and they are as much entitled to the interest they make, as a banker is entitled to the interest arising from the money put into his hands by his customers.

In the case of several public accountants, the law has very recently been altered, whilst others are still entitled to the right of keeping the interest on the money in their hands. Thus the Paymaster of the Navy is now, since the office has been regulated by statute, no longer entitled to interest, but previously he was not accountable for interest. It was so with the Masters in Chancery, and it is so at this moment with respect to the Receivers of the land-tax, and Receivers-General for counties — persons generally of respectable station are appointed, with salaries such as would never make it worth while to those gentlemen to accept it, amounting only to fifteen or twenty pounds a year; — they make interest of the money, having it always ready to pay over whenever it shall be demanded; but during the interval they avowedly make interest upon it, and that is the source to which they look for their remuneration. It is so with respect to the Registrar of the Admiralty, and the Deputy Remembrancer of this Court, and that, notwithstanding the special attention of the Legislature has

has been recently called to the subject, and although they have legislated upon it, they have not interfered with the vested right of the present Registrar; for the provision made is to take effect after his demise or resignation: and the Deputy Remembrancer of this Court is still fully in possession of that right without infraction of any law. They enforced these propositions by reasons of analogy with the rule of the common law, which does not give interest on money withheld, except in the case of bills of exchange, and that is an exception by force of the custom of merchants, but in the common action for money had and received, interest on the sum recovered is never allowed, and is only to be obtained collaterally.

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As to the surcharge of interest upon the difference between the gross and the net proceeds, amounting to 27,000*l.* and a fraction, from the 3d of *May*, 1809, the date of the first Order in Council upon the subject, until the statement of the account by the Auditors, — they submitted, that if the Commissioners were, as Prize Agents, entitled to charge commission upon the gross proceeds, of course the surcharge of interest on the difference, must fall to the ground; — or if they are not entitled to retain such commission to be charged upon the gross, but the net proceeds, then their expences ought to be allowed, which, amounting to about 22,000*l.*, would reduce the difference to 5,000*l.* instead of 27,000*l.* and on that smaller sum only, such interest ought to be charged.

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The surcharge of interest, they submitted, would depend on the plaintiffs being held to be properly called upon to pay over the interest itself, or not; but at all events they insisted the Commissioners could not be called upon to pay interest upon that interest, but from the period at which they ought to have paid the interest itself over.

The surcharge of 3,500*l.* for brokerage in effecting insurances, they contended was unfounded, submitting that that was a part of their duty advantageously performed, whereby expence was saved to the King; and therefore furnishing a claim for remuneration, independently of their other services and of the character in which they had been performed.

On general principles therefore, they contended that the plaintiffs were *de jure* to be considered as Prize Agents, having *de facto* performed all the functions of Prize Agency, together with many more, and because after a declaration of hostilities they could not have acted but as agents for prize, — that they acted so expressly and by appointment as to the *Irish* ships, and in effect and by necessary implication as to the *English* ships; — that although the words “Prize Agents” are not mentioned in the act or the commission, the reservation in the instructions as to their duties under the act clearly shews they were Prize Agents, for they could not deal with the matters thereby entrusted to them otherwise than


than as Prize Agents; — that if they were Prize Agents, they became (there being no specific bargain between them and the Crown) entitled to be paid that commission to which persons were usually and by custom entitled for Prize Agency, which was at that time five *per cent.* upon the gross proceeds, and that not controverted on the other side, but recognized by the act of the 45th of the King, ch. 72. s. 69. which, for the first time, introduced a different remuneration for Prize Agents, directing that they should in future charge their commission upon the net, and not upon the gross proceeds; — that if Prize Agents were entitled before that act to charge their commission upon the gross proceeds, so would the plaintiffs. And they also insisted, that they were entitled either as Prize Agents or as Commissioners, or whatever might be their character, to the benefit of making profit by interest of monies remaining necessarily in their hands for current exigencies, until those monies should be wanted, so that they were always ready to meet the exigencies of their situation when the necessary calls should be made upon them; — in fine, that to establish that the plaintiffs were Prize Agents, was to establish the whole of their case, with the exception of the brokerage, which must stand upon its own ground.

That if, on the other hand, the plaintiffs were not Prize Agents, then they ought to be allowed to charge commission upon the net proceeds, as Commissioners, and to be allowed besides the ex-

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pences of their establishment, which would come to within 5,500*l.* of the same amount, and would reduce the difference, with all the accumulation of interest upon that difference, to a minor point — and that at all events the dates which the Auditors have taken for their computations were erroneous and calculated to work injustice.

Finally, they contended, that if the plaintiffs were not to be considered Prize Agents, but accountants having money in their hands, yet as they held that money under circumstances not calling upon them to account for the interest made, they not being shewn or even charged to have unnecessarily or improperly retained for an hour any part of that money, but it being money which they kept to answer current expences, or demands likely to be made upon them, they were entitled to make interest of it in the mean while: — that the general ground that all public accountants are accountable for interest, is not supported by any law or statute; — that if they are entitled to the 42,000*l.* interest so made by them, of course they are not liable to be surcharged with the interest arising upon it, and at all events, if they are chargeable with any interest, they were not liable from the periods at which they are stated to be chargeable, nor until there was a declaration of the accounts made, which should state that it was improper for them to retain it, and to which they would be bound to defer; — that the charge of the brokerage being no extra charge upon Government, but as

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an allowance made to them as brokers in the customary course by the underwriters, the Crown ought not to claim the principal, sum; but even if they claim the principal at all events they ought not to claim the interest; or, claiming the interest, they ought not to claim it until the period had occurred when they were called on to pay it over by a competent authority, or, at least, until they were bound to have paid it without such call.

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The *Attorney General*, *Dauncey*, and *Mitford*, for the Crown, insisted that the plaintiffs were not entitled to any part of the prayer of the bill.

Before they entered on the defence, they submitted, as an objection in limine to the jurisdiction, that in a case of this description, where the plaintiffs had been employed by the Crown without any understanding with respect to remuneration, they had no right to apply by bill to this Court, or in any other manner to any Court of Justice, to fix in their favor a *quantum meruit* of remuneration to be paid to them by the Crown; — that whatever claim they might have in a moral sense, they had no means of enforcing it at law; — that there was, in that respect, a necessary distinction between employment by the Crown and by the subject, as in the latter case the person employed would, unless his services were purely gratuitous, have a right to apply to a Court for recovering either his stipulated remuneration, or, where the considera-

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tion were left open, a *quantum meruit*; whereas the remuneration of persons employed by the Crown on the other hand was wholly at the discretion of the King, and the reason was obvious, for otherwise every public functionary who could assimilate his services to those which, between subjects, were accustomed to a particular rate of remuneration, might have power to bring an action or file a bill against the Crown on every occasion of personal dissatisfaction, to the great hindrance and embarrassment of the public business. It was true (they observed) that in the present case there was this distinction, that there happens to be money in the hands of the plaintiffs, and therefore the question is, in fact, whether the party be entitled to frame his claim of *quantum meruit* in form of a set-off against the demand of the Crown calling for an account of money remaining in his hands, arising from the disposal of the property of the Crown, on the ground of a lien for the amount of some suggested right to remuneration for certain services. Still, in principle, the right claimed must be the same, and must be founded on the same rules, the only difference being the mode of ascertaining and obtaining it. If, therefore, the plaintiffs were, in such a case as this, entitled to retain money in their hands on that ground, they would also be equally entitled to demand it at the hands of the Crown, in a case where they should, in performance of their duty, have paid the whole into the Treasury; and if they should be found to have no effectual means of redress

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in the latter case, they could have no such right to secure themselves by retainer in the former. In all cases of public employment by the Crown, therefore, they insisted the functionary was entirely dependant for remuneration on the liberality of the Crown, and could have, from the political nature of the connection, no legal right to or means of putting in force a claim of compensation through the medium of a Court of Law, his only course for redress being by petition of right: and they referred to *Com. Dig. tit. Action, C. 1. Prerogative D. 78.*

They contended, therefore, that even if the plaintiffs should be held to be entitled to remuneration as Prize Agents of the Crown, they could not enforce any such claim on their part as that now set up in answer to the demand of the Crown — that they should render their accounts after the manner prescribed — that they were wholly, in respect of remuneration, in the hands of the Crown, and were entitled, under this sort of unconditional engagement, to no more than what his Majesty or his Auditors might think proper to allow them. It had been so with the Commissioners of the *French* ships which were detained in 1756, who were allowed a remuneration of only two and a half *per cent.* on the net proceeds, and no one of those had ever thought of being dissatisfied, or making any further demand upon the public. Whether the Commissioners were to be considered Prize Agents to the King, or not, it

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could make no difference in the principle; but they insisted that they were not, nor could be considered Prize Agents according to the well known incidents of such employment, as recognized by law and the statutes relating to it. In the 33d of *Geo. III.* c. 66. (before the appointment of the plaintiffs) there were many regulations and enactments respecting Prize Agents—such as that they should register their appointment, the power of attorney, &c.—not one of which had been complied with by the plaintiffs, and that for the obvious reason that they were not and did not consider themselves to be Prize Agents in fact, by virtue of their special appointment. They urged, that in all their conduct, and in every transaction, the plaintiffs had acted not as Prize Agents, but as Commissioners—that they had always so stiled themselves, and in the case of *Lucena v. Craufurd*, both in the original cause and on the *venire de novo*, had relied upon their interest as Commissioners, and averred the interest to be in them in that character—and that they had preserved that character and description of themselves throughout, in all their correspondence with the Lords of the Privy Council, and upon all other occasions, till the year 1809, when, for the purpose of the present claim, they first began to assume the name of Prize Agents, and to insist on a legal right to a *per centage*, according to the then accustomed rate of remuneration. They then adverted to the imperative language of the act of Parliament, directing the plaintiffs, after payment of the duties and expences of sale,

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to pay the proceeds into the Bank of *England*, which would be inconsistent with their appointment as Prize Agents; for, had they been invested with that character, they would have had a right to have retained their commission out of the proceeds, before they should pay it into the bank: and they contended that the language and the terms of the several Orders in Council (on some of which the plaintiffs had much relied), were also quite incompatible with the notion that they were Prize Agents and not Commissioners; and they concluded that part of the argument by again insisting, that even if the plaintiffs were *de facto* Prize Agents, persons entitled to a specific remuneration for the business done by them, as in the common case of agents employed by captors, they had still no right to set up such demand in this way against the Crown, or, indeed, in any manner, through the medium of a court of law.

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As to the distinction made of the produce arising by sale of the ships and their cargoes, being, as droits of Admiralty, his Majesty's private property, and no part of the public Revenue, they observed, that Admiralty droits, as appertaining to the King, who was bound to provide for the exigencies of the state, were still public property, although not given up like the land revenue and the hereditary duties of Excise under the Civil List Act; that the public were interested in the care of it, and that it was therefore matter of account before the Commissioners of Audit.

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On the question of the surcharge of 42,000*l.* for interest made by the plaintiffs, or rather, as they put it, the demand by the Auditors of that sum so made by interest, as being part of the actual produce of the sales, they submitted, that as the object of the act, before hostilities had actually commenced, was to pledge the national faith for the national engagements, and to assure to the friendly subjects of the United States the safety of their property brought into this country for the purpose of protection from the *French* government,—the money arising from the sale of that property, was directed to be immediately lodged in the *Bank of England* as the only acknowledged place of security for it, when the property should be turned into money, where it would be most readily accessible in case of emergency;—that the Commissioners had therefore no discretion, but were to pay it over, even if it should be as inconvenient as it had been represented to be; but that that inconvenience was, however, to be obviated by applying to the Council on all occasions of necessity, and obtaining their order for whatever money might be wanted. After hostilities had commenced, there was very little pretended motive for keeping any balances in their hands, and even the pretence of having the money always ready to answer demands, would not justify the putting it out to interest; for while it was so placed out, it could no longer be immediately forthcoming for that purpose, because the Commissioners must, for a certain time, have thereby necessarily parted with  
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all control over it, and put it out of their own immediate reach; and besides its being thereby subject to the hazard of their own personal responsibility, it was also risked on that of those to whom they might have entrusted it. To have so used it therefore was, in itself, a refutation of the plea of such balances being necessarily kept by them for the purpose alleged, of immediate satisfaction of impending demands \*. They also urged, that with respect to the other public officers, such as Receivers General, &c. to whom the plaintiffs had been compared, as persons avowedly and legally making interest of public money, such a custom could be only permissive, and might be made at any time the subject of enquiry; but that those officers were, moreover, in one very material respect of their functions, differently situated from these Commissioners. They are not liable to be called upon at various and uncertain periods for the public money in their hands, but at certain stated times which were fixed for the purpose, and it might, perhaps, be sufficient that in such cases the Accountant should be ready to pay over the amount of his balances at those times; whereas these Commissioners could not, even if their reasoning were founded on truth, have been sure of an instant of time when they might not be called on for the money in their hands, even if they could be supposed, contrary to the object

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\* The money was made productive by interest on omnium and Exchequer bills, and *discount of bills of exchange*, the latter to a very considerable proportion of the whole amount.

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and terms of the act of Parliament, to be entitled to keep any money in their possession for the shortest period.

The surcharge of interest on the 42,000*l.*, they admitted, would depend on the question of that sum having been properly or improperly disallowed.

With respect to the deduction for the charge of brokerage, which had been disallowed, that, they submitted, fell under nearly the same observations as the sum claimed for interest;—that whatever might have been saved by such means formed no item of expenditure on the part of the Commissioners to discharge them for so much; but contributed to swell the produce of the property, and ought, therefore, to be accounted for by them, the question of their ultimate remuneration always depending on the amount of the net produce of the property committed to their care, disposal, and management, of which duty, if insurances were necessary, the business performed by brokers was a component part;—that the insurances were, perhaps, very proper, but it was the duty of the plaintiffs, if it were necessary to insure, to effect insurances, and at the least possible expense; it was also their interest to do so, because it would swell the aggregate of the net produce, and consequently their remuneration, after whatever rate it should be meted to them.

They

They denied that there was any real distinction, in effect, between the positive character or the duties of the plaintiffs, before and after the declaration of hostilities, or that the case of *Lucena v. Craufurd* had decided that the Commissioners were to be considered as Prize Agents in the sense in which they now contended that they were; — the only question in that case being, whether they had an insurable interest in the ships and cargoes which had been lost.

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The real character of the Commissioners (they insisted) was, both before and after hostilities, that of trustees of this property for the public, and the persons more immediately interested in it; and as trustees they were bound to account for the interest made on the balances in their hands to those to whom the principal belongs. They cited the case of *The Earl of Lonsdale v. Church (a)*, on that point, where it was held, that a person being a servant of the public (between whom and the private servant of an individual the Court took a distinction, and that they now urged, in answer to the cases cited on the other side) whose duty it was to collect the tolls of a harbour, was held to be accountable for interest on the money received by him, which he had put out at interest: and they noticed that one ground of that determination was, lest it should be a temptation to public Receivers to put

(a) 3 Bro. C. C. 41.

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it out of their power to be ready with the money due, when it should be demanded.

[The *Lord Chief Baron* assenting to the doctrine of that decision, observed, that in the case of public money, there was this distinction, that there could be no binding contract presumed, allowing any one to have the use of it in the way of making interest without account. His Lordship, in this part of the case, required to see the information filed by Lord *Kenyon*, when Attorney-General, in *Rigby's* case (the cause being compromised, never came to a hearing), but was informed by the officer that it could not be found.]

On the acts of Parliament which had been referred to (39th and 40th, and the 47th *Geo. III.*), empowering the Auditors to charge Accountants with interest, they observed, as to the propriety of the charge in the present instance, that those statutes had given power to charge interest on balances whether made productive by the accountant or not, where such balances had been improperly retained; whereas here, they had been confessedly made productive of interest; yet it had not been charged against them by the Auditors *quod* interest, but as forming part of the aggregate produce, all of which they had been required, by the act, to pay into the Bank: and they insisted that such requisition alone, made any withholding of balances improper.

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On the alternative prayed by the bill, — that in the event as to the first object of the plaintiffs, of the Court holding that they were not invested with the character of Prize Agents, and had no right to be remunerated according to the acknowledged rate of Prize Agency, the Court would then proceed to enquire whether the remuneration proposed by the Auditors was stripped of the advantages claimed, an equivalent for the services performed, and the expences incurred by the Commissioners, — they submitted, that since the Audit acts (25th *Geo. III.* c. 52; 39th and 40th, c. 54, and 47th, sess. 2. c. 39.) by which, on the abolition of the old office of Auditors of the Prest, and the establishment of an *efficient* Board of Commissioners, with enlarged powers and extended authority, they had become the constitutional tribunal for the investigation of such claims; — that even if this Court should hold that they have jurisdiction to interfere in the control of that Board, in the exercise of that part of their duties, it would, from the nature of such enquiries, be utterly impracticable, considering the extent of occupation and time which such details must and would necessarily exact to do so on the many occasions which would arise; and the act of the 25 *Geo. III.* c. 52, would be rendered nugatory, because such interference of the Court of *Exchequer*, in other respects than on the occasions particularly pointed out by the act, would destroy the authority with which the Commissioners were intended to be exclusively in-

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invested by that statute in checking the charges of the public Accountant.

[RICHARDS, *Chief Baron*.—It was very solemnly determined in *Sir George Colebrooke's* case (a), that this Court has still the same jurisdiction over the Commissioners for auditing the public accounts, as it formerly had over the ancient Auditors of the Imprest.]

In recapitulation, they submitted, that (if the Court had jurisdiction in such a matter) as this was a case in which the plaintiffs had taken upon themselves the performance of a duty by appointment of the Crown, they became accountable to the Crown for all the money which they should receive in the course of that duty, and for all the interest which they might make upon that money;—that that was a general principle;—that they are particularly accountable in this case, because, however the situation of the property might have been changed by its becoming a droit of Admiralty, or otherwise, their duties and the functions to be performed by them, still remained the same as those with which they had been entrusted by the terms of their commission, and they were governed by the regulations of the act of Parliament, which had directed them to pay sums of money into the Bank—and that it was because they have not paid those sums of money into the Bank, but have retained them and made them produc-

(a) A report of that case is subjoined to the present.


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tive of interest; they are now charged with that interest:—that with respect to the remuneration claimed, that was not to be measured by any fixed rule, as by a rate of *per centage*, or by any acknowledged standard of allowances or disallowances, but must be wholly subject to the discretion of his Majesty in Council, who had constituted the plaintiffs his special Commissioners;—that the allowing or taking a *per centage*, upon the net proceeds, was only one means of arriving at a conclusion as to what would be a fair compensation, but the adoption of such a mode did not at all proceed upon the principle of that being the rule by which it ought to be done,—and that being entirely dependent on the discretion of his Majesty's Government, could not be made the subject-matter of a bill in Equity, to be filed against the Attorney General in the Court: constantly keeping in view the position, that this Court had no jurisdiction to interfere, in a case like the present, to direct the opinions of the Board of Commissioners, the *quantum* of remuneration not being as matter of legal right demandable in a Court of Law or Equity, but was matter of pure discretion at the pleasure of the Crown. They submitted, therefore, that this bill ought to be dismissed.

*Wetherell*, in reply, denied that the plaintiffs were bound by any mistaken representation of the character under which they might have considered themselves as acting; for that their real character, and the incidents on it, were fixed and determined

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whatever they might be. And he urged that the high nature of their appointment as Prize Agents in effect and substance to the Crown exempted them from the observance of the common formalities enacted by the prize agency statutes to regulate the conduct of such agents, when acting for subject employers, the provisions of which for the most part, and particularly those which had been mentioned as not having been conformed to by the plaintiffs, were meant merely to provide against secret agencies, by requiring formalities which should tend to give them publicity: and that if the plaintiffs were, in substance and effect, Prize Agents of the Crown, they would be entitled to remuneration.

On the subject of the jurisdiction \* in the present case, he submitted,—citing 4 *Co. Inst.* cap. 11, *passim*. *Fleta*, l. 2. c. 32. and *Fitz. Nat. Brev. (Writ ex parte talis)*, 129 — that there could be no doubt that if the Crown should be dissatisfied with the conduct of the Auditors, in choosing to throw away the public money by means of improper allowances in fraudulent accounts, this Court would, if called on by the Attorney General for that purpose, have a right to interfere, and that the system would be glaringly insufficient and defective if it had not. He urged, therefore, that if they had such a power at all, it was not unilateral or limited, but reciprocal: and that it extended over the whole subject-matter, and

\* Vide, on that point, *The Attorney-General v. Colebrooke*, post.

embraced

embraced every thing connected with that authority. Whatever interference, therefore, might be afforded in aid of the Crown, might also be exercised for the relief of the subject. He finally insisted, that want of jurisdiction in the Court could not now be used as an objection; for that could only be taken advantage of by demurrer.

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He contended, also, that the remuneration of functionaries in the public employ, was not mere matter of grace in the breast of the Crown, but a demand of right on the public treasure, as administered by the appointed officers of the Government of the State: and that a public functionary was entitled to discharge himself in his accounts before the Auditors, by taking credit for the amount of his salary or other remuneration, and was not compellable to pay over the final balance of the money received by him, leaving his own demand to be afterwards satisfied at the pleasure of the Crown: submitting, that for the reasons urged, the plaintiffs were entitled to the decree which they prayed.


*Cur. adv. vult.*

On this day the Court (being full) delivered judgment in the *Exchequer* Chamber.

29th April.  


RICHARDS, *Lord Chief Baron*, having stated, at length, the prayer of the bill, thus proceeded:—

The Commissioners therefore insist, that they are to be considered as Prize Agents to his Majesty,

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jesty, and that they are, in that character, entitled to a remuneration for these services, of five *per cent.* on the gross proceeds of the sales made by them: and also (according to the usage) to interest on such balances as may necessarily and properly have been retained by them:—and in case the Court shall not think they are Prize Agents, then they claim to be entitled to interest, comparing themselves, in point of situation, to Receivers General, and other public officers who are named in the course of the argument, and submit, that they also are entitled to such interest as they have made of the public money whilst it remained in their hands.

[His Lordship here stated the facts of the case as already detailed.] Under these circumstances, an order was made by his Majesty in Council, dated the 16th of *January*, 1795, by which it was directed, “ that all goods, wares, merchandizes, and effects whatsoever, coming directly from any of the ports of this Country, in the vessels of any Country, and navigated in any manner, shall be permitted, until further order, to be landed, and to be secured in warehouses under the joint locks of his Majesty and of the proprietors, at the risk and expence of the proprietors, there to remain in safe custody for the benefit of the proprietors thereof, until due provision shall be made by law, to enable such proprietors to re-export or otherwise dispose of the same.”

There

There was another order of his Majesty in Council, made a few days afterwards, on the 21st of *January*, in the same year, by which it was ordered, "that all goods, wares, merchandizes, and effects whatsoever, belonging to any of the subjects or inhabitants of the United Provinces, or belonging to any subject of his Majesty, or to any subject of any Country in amity with his Majesty, coming from any part of *Europe, Asia, Africa, or America*, in amity with his Majesty, in vessels belonging to any subject or inhabitant of the United Provinces, or to any subject of his Majesty, or of any Country in amity with his Majesty, and bound to any port of the United Provinces, might, until further order, be permitted to be landed in any port of the Kingdom, and might be secured in warehouses for the benefit of the proprietors thereof, in the same manner as was directed by the last-mentioned order of his Majesty in Council."

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After this, on the 16th of *March*, 1795, an act of the 35 *Geo. III. c. 15*, was passed, in order to render these Orders in Council effectual; but it does not seem to me that this act bears particularly upon the case at the bar, and therefore I shall proceed to state, that another act of Parliament was passed on the 22d *May*, 1795, namely, the 35 *Geo. III. c. 80*, with the same view, and that does apply most importantly to the present case. Without referring to the provisions in this act in general, it will be sufficient to advert to sections 21, 22, and 26.

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Section 21 is this:—“And whereas several ships and vessels belonging to the subjects or inhabitants of the United Provinces, and also other ships and vessels having on board goods, wares, merchandizes, and effects belonging to such subjects, have been, or may hereafter be detained or brought into the ports of this Kingdom; and whereas such cargoes, and such ships and vessels may perish or be greatly injured if some provision be not made respecting the same:—Be it enacted, that it shall and may be lawful for his Majesty, by and with the advice of his Privy Council, from time to time to grant a commission or commissions under the Great Seal of *Great Britain*, to three or more persons, authorising them to take such ships and cargoes into their possession, and under their care, and to manage, sell, or otherwise dispose of the same to the best advantage, according to such instructions as they shall from time to time receive from his Majesty, with the advice of his Privy Council, subject, nevertheless, in respect of goods, wares, and merchandize hereby directed to be brought into the warehouses of the *East India Company*,” to the special provisions made in the act, which do not apply to the present question.

The 22d section is in these words:—“And be it further enacted, that it shall not be lawful for any person to prosecute any claim, or maintain any suit or action respecting any such ship or cargo, excepting in the manner herein specially provided.”

Then

Then the 26th section is this:—"And be it further enacted, that if any of the ships or vessels, goods, wares, merchandize, or effects shall be sold under the authority aforesaid, they shall be respectively liable to the duties, and entitled to the drawbacks, and subject to the conditions, rules, regulations, and restrictions, penalties and forfeitures before mentioned; and the Commissioners shall and are hereby authorised and required to cause the duties and expences of the sale, in the first place, to be paid out of the proceeds of such sale; and after such payment shall, except in cases where it is otherwise provided by this act," and which do not belong to or affect the present question; "cause the proceeds of such sale to be paid into the *Bank of England*, there to remain subject to such orders as his Majesty, with the advice of his Privy Council, may from time to time think fit to give thereupon; and if such proceeds shall arise from a sale under the direction of the High Court of Admiralty, then subject to such orders as that Court shall make, concerning the same:" now much attention is due to these words, "and after the payment of the duties and expences of the sale, the Commissioners shall cause the proceeds of such sale to be paid into the *Bank of England*, there to remain, subject to such orders as his Majesty, with the advice of his Privy Council, shall think fit to give thereupon."

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The other sections, for the most part, relate to the duties of the Commissioners when they shall be appointed, but it does not seem to me to be necessary to trouble the Court with them upon the present occasion. By the 21st section, which I have read, the Commissioners, when appointed, are to attend only to such instructions as they shall from time to time receive from his Majesty, with the advice of his Privy Council; and by the 26th section they are required, after the payment of the duties and expences of sale, to pay the proceeds of sale into the *Bank of England*, there to remain, subject to such orders as his Majesty, with the advice of his Privy Council, might from time to time think fit to give thereupon. The 22d section prevents any actions being brought, otherwise than as is mentioned in the act of Parliament.

In consequence of this act of Parliament, a commission duly issued to the plaintiffs and their colleagues; and pursuant also to the directions in the act, instructions were given to the Commissioners, when they were appointed, for their conduct. Those instructions are the first exercise of the power given by the act of Parliament, and they, referring to the Orders in Council, are in these words: "You are directed to proceed forthwith to take into your possession and under your care, all such ships, goods, wares, merchandizes, and effects as are mentioned in an act of Parliament passed in the 35th year of the reign of his present Majesty, and a commission granted to you under the Great Seal

Seal of *Great Britain*, according to such lists as you shall from time to time receive from the Commissioners of Customs in *England* and *Scotland*, in pursuance of directions they are to receive from the Treasury; and you will receive all necessary assistance from the Commissioners of his Majesty's navy at all the ports; and you are hereby authorised to make such allowance to the crews of such ships and vessels as may be taken under your care and protection, in payment of their wages, as shall appear to you to be just, for which purpose money will be issued to you on account;" — so that they were not to be charged with the issue of any money of their own accord, but money was to be issued to them in order to enable them to make these payments, which they are here directed to make to the crews of the ships and vessels; — "but (the instructions proceed), you are to take care that all monies which you shall so pay, shall be replaced out of the sale of the ships, and the goods, wares, merchandizes, and effects as soon as the same shall be sold;" and they were, in pursuance of the directions given, to cause all goods, wares, and merchandizes belonging to the *East India Company*, to be applied according to the act. They add, "you shall cause minutes to be kept, and fair entries to be made in books, of all your proceedings and transactions whatsoever, in executing the commission, and these your instructions, and also accounts of the proceeds of all sales, distinguishing the ships which shall be so sold, and the goods, wares, merchandizes, and effects

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effects taken out of each ship ; and also you are to take an account of the monies which, according to the directions of the act, shall be paid into the *Bank of England*, or shall be lodged in the hands of the *East India Company*, for which, according to the directions of the act, credit is to be given to you in the books of the said Company ; all which accounts shall be kept in such form as shall be approved of or directed by the Lords Commissioners of his Majesty's Treasury, in discharge of the trust conferred on you by the aforesaid commission ; and you are to be careful to execute the direction given you in the several clauses of the said act ; and in all cases of doubt or difficulty you are to apply to the Privy Council for further instructions, which will be issued to you from time to time as the case may appear to require."

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Under these circumstances, the constitution of this body was certainly formed by the commission, and they were clearly Commissioners acting under the authority of the act of Parliament. They were not originally Commissioners as Agents relating to any prize beyond all question ; for there was no war then depending between us and *Holland*, whatever opinion might prevail of war being likely to take place, which was certainly justified by the event. That result took place on the 15th of *September*, 1795, when letters of reprisal were issued against the inhabitants of the United Provinces of *Holland*, which are always considered as a declaration of war. The situation of the
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Commissioners seems to me to have then had an alteration made in it; for before, they were not Commissioners with a view to the war; they were Commissioners in the state of things anterior to the war, and independently of the war; their commission was applicable only to the state of things as it was before the commencement of hostilities. Upon that event a perfect alteration seems to me to have taken place in respect of the objects of the commission; for any vessels taken before the declaration of war, were to be kept subject to the orders of the King in Council, for the benefit of those to whom they might belong; but after the declaration of war, all the captured enemies' ships, &c. became prize, and belonged absolutely to the King *jure coronæ*. Until the declaration of war, the King had no right *jure coronæ*, or any claim to the ships or vessels, or property which might be taken by the Commissioners into their possession; but after the declaration of war, all captures were prizes of enemies' property, and belonged to the King in right of his Crown: yet still, though their precise and strict character was altered, and the duties which they had to perform were altered, no alteration took place in the terms under which they acted, or the nature of their subsequent employment, unless, as they contend, an instrument which I shall presently advert to, necessarily imported a change in the conditions on which they afterwards served his Majesty.

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The next proceeding that appears material is, the Instructions of the 10th of *October*, 1795, to the Court of Admiralty. At that time this Country was at war with the States of *Holland*. In these instructions it is recited, (after reciting the act of Parliament and the appointment of the Commissioners) that the Commissioners so appointed, had taken possession of many ships and goods belonging to the subjects and inhabitants of the United Provinces; and that since the issuing of the said commission, his Majesty had thought fit, by and with the advice of the Privy Council, to order general reprisals against the ships, goods, and subjects of the United Provinces, and to issue a commission, authorising the Commissioners for executing the office of Lord High Admiral, to will and require the High Court of Admiralty of *Great Britain*, to take cognizance of, and judicially to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships and goods that are or shall be taken, and to hear and determine the same, and according to the course of the Admiralty and the law of Nations, to adjudge and condemn all such ships and goods as shall belong to the United Provinces, or their subjects, or to any other inhabiting within any of their territories or dominions: and his Majesty doth thereby order and direct, that the said High Court of Admiralty shall proceed to the adjudication of such ships and goods of which possession had been taken, or should be taken by the said Commissioners, as should be proceeded

ceeded against by the Advocate General on his Majesty's behalf, "in order" (in the words of the instrument) "that the same, being the property of the United Provinces or their subjects, may be condemned to us as good and lawful prize; reserving nevertheless to the said Commissioners the care, sale, and management thereof, as well before as after final adjudication, *according to the provisions of the said act*: provided always, that nothing herein contained shall restrain the Judge of the Court from receiving and determining all claims, &c." which is not material. Thus it directs, in effect, that the property may be condemned as good and lawful prize," acting upon the law as it certainly stood the instant hostilities were declared; "reserving nevertheless to the said Commissioners the care, sale, and management thereof, as well before as after final adjudication, according to the provisions of the said act;" and that is, certainly, an important reservation.

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In this paper, called the instructions, and importing to be directions to the Court of Admiralty, the plaintiffs were named Commissioners. There has been certainly considerable difference of opinion amongst very learned men, whether they continued Commissioners after the commencement of hostilities, or whether their character, situation, and duties were not thereupon changed; and I do not see that the case of *Lucena v. Craufurd*, in the House of Lords, has quite determined that question; for there was a ground for that decision, which has the effect of excluding such a determination;

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termination; because there were some ships amongst those upon which the verdict was taken, that clearly were not within the authority of the Commissioners, even as Commissioners; but, whether they considered themselves strictly as Commissioners, it is clear they did not retain precisely the same character in which they stood when they were first appointed; and it seems that the act of Parliament, and these instructions, united together, created and formed the sole foundation of the duties of the plaintiffs. The instructions direct that the Commissioners shall have the care, sale, and management of the property to be condemned as prize to the King, according to the provisions in the said act; whatever therefore, their strict authority might have been, it is clear that their duties were according to these instructions, which they accepted, and by which they were bound, and were to be regulated and performed in the same manner, with reference to the act of Parliament, as their duties when they were appointed Commissioners. The instructions reciting the act of Parliament and the proceedings consequent upon the commission, connect the act and the instructions together, as prescribing the duties of the Commissioners, and provide that they shall have the care, management, and sale of the property, according to the provisions of the said act. The effect of this document (the instructions) appears to me to be to shew, that though the property was, in consequence of hostilities, vested in the King by his prerogative, the Commissioners, or, in other words, the persons who had before received a commission,


mission, that is, the plaintiffs and their colleagues, were to act as the Commissioners had been authorised and instructed to act. They were still bound by the directions of the 35th of the King, which were, by reference, incorporated in the commission and their instructions, just as they were at the first moment when they were appointed Commissioners; and therefore whatever name they ought to have been called by, they stood in the same relationship of duty to the King that they had borne before to the Kingdom, I may say to the Country, being then the Commissioners immediately of his Majesty. At this time there was certainly no new contract; there was not even any new treaty, but the plaintiffs and their colleagues accepted their new character in silence, and must, I think, be presumed to have assented to the terms upon which they had acted before; but the next proceeding removes that doubt, if any can be said to prevail, by giving them another designation. Upon the next document great stress has been laid, namely, the Order in Council of 26th November, 1795, respecting the four *Dutch East India* ships. That order is in these words:—"At the Council Chamber, *Whitehall*, 26th November, 1795; present, the Lords of his Majesty's Most Honourable Privy Council:—Whereas it appears, that four *Dutch East India* ships, namely, the *Alblasserdam*, the *Vrouw Agatha*, the *Mentor*, and the *Dordrecht*, now lying in the River *Shannon*, in the Kingdom of *Ireland*, were sent in there by his Majesty's ship *Sceptre*, commanded by *William Essington*, Esquire, or by other ships under

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under the command of the said *William Essington*, Esquire, antecedent to the order issued by his Majesty in Council, for granting reprisals, and appointing agents and so on; and whereas the sole interest in all ships so sent in, are vested in his Majesty, and the appointment of agents for the care and disposal thereof, does of right belong to his Majesty, "It is hereby ordered in Council, that *James Craufurd*, *John Brickwood*, *Allan Chatfield*, *John Bowles*, and *Alexander Baxter*, Esquires," naming them severally, not describing them as Commissioners, as they had been called in the former order, and appointing them specially to be "the agents on behalf of his Majesty, for the care and management of the said four *Dutch* ships and their cargoes," whereof all persons concerned are to take notice, and govern themselves accordingly. By this it appears, that Captain *Essington* having taken the ships, and sent them in before the commencement of hostilities, he, and others concerned in sending them in, joined in appointing agents to support their claims. The Privy Council thereupon by their order, reciting that fact, and that the property was exclusively in his Majesty, ordered, that these gentlemen, by name, should be the agents on behalf of his Majesty, for the care and management of the said four *Dutch* ships and their cargoes. There is no doubt at all that there they were appointed Agents, and not Commissioners, unless Commissioners and Agents can be considered as the same thing. They are described by their names distinctly, and are appointed  
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Agents expressly for the care and management of those ships. Proceedings were afterwards had in the Court of Admiralty against these four ships, and they were condemned as good and lawful prize to his Majesty. The Order in Council, appointing these gentlemen Agents for the care and management of these *Dutch* ships, was much relied on in argument, as constituting or acknowledging the plaintiffs, who had been Commissioners, Prize Agents to his Majesty. If that was so, must not the effect of it be confined to the four ships only which are the subject of this order? for this order does not extend to any other ships, and if it is the ground on which the plaintiffs mainly stand, it raises a strong argument against their claim to be considered as Agents in respect of any other ships, for if there must be an order to make them Agents as to these it was equally necessary that they should have an order with respect to the other ships, and if they had not such order, the negative is very strongly proved; but in my own opinion (and every body who hears me will understand I am only giving such reasons as occur to myself, the Court only uniting in the result, but I give my own reasons) although they are appointed Agents for the purposes specified with respect to these ships, they are not Prize Agents in the ordinary sense of that word; but they are constituted by the Privy Council, not, indeed, by the King, Agents or Servants to his Majesty with respect to those four ships and their cargoes; subject however, as it seems to me (since nothing is expressed

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pressed to the contrary), to the same terms and conditions as are contained in the instructions to the Court of Admiralty, dated the 10th of *October*, 1795, which I have already stated to the Court. It does not, therefore, seem to me, as there is nothing said in this last order altering the terms on which they acted before, that it can be considered as relating to any thing further, except as to the particular agency of these ships, than was imported necessarily in the former proceedings.

These are, I believe, all the facts on which the questions in the case depend. A great deal has passed which does not at all apply to the question before us—there has been much correspondence, and so on: however, it is proper to observe, that proceedings were had in the House of Commons, and continued there for a considerable time, in every part of which the plaintiffs and their colleagues described themselves as Commissioners only, and rendered their accounts to the House as such. Now, certainly, if they are to be considered as only Commissioners, and not, according to their own construction, Prize Agents, there is an end, at once, of the demand of the five *per cent.* on the gross proceeds.

On the 3d of *May*, 1809, there was an Order in Council, in which they are treated as Commissioners acting in the character which had been imposed upon them by the act of 35 *Geo. III.* c. 80. On the 12th of *May*, and on the 17th of *May*, 1809, there

there are letters from them to the Clerk of the Privy Council, in which they urge their claims in the character of Commissioners, and by those letters they certainly submit their compensation to the discretion of the advisers of the Crown. Then, on the 15th of *July*, 1809, there is a letter from Mr. *Faulkner*, the Clerk of the Council, in which they are still treated as Commissioners; he deals with them, and they deal with the Privy Council as persons who claim a fair remuneration, not so much as a matter of legal right as a matter of grace from the Crown, or of moral, not legal, justice on the part of the Crown. No instance has been produced, nor have I discovered any instance in which Commissioners, as such, have claimed, as a matter of right, or maintained any suit against the Crown for their remuneration as a matter of legal right; and it seems to me that it must be admitted, that as Commissioners, they were not entitled to demand, at law, any particular compensation from the Crown; and throughout all the proceedings with the Privy Council, they urge their claims as Commissioners, as if they were not entitled to any specific compensation; they seek to persuade the officers of the Crown to advise the Crown to exercise its discretion in their favor: and this was the course of proceedings on their part, until the 29th of *September*, 1809, proceedings in the House of Commons having been taken several years before, in the year 1806, I think. Afterwards, on the 29th of *September*, these gentlemen, for the first time, insist that they are Prize Agents, and as

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such, claim to be entitled to five *per cent.* upon the gross proceeds, and to retain the interest made on the balances in their hands. They claim the five *per cent.* commission upon the gross proceeds, and; to be sure, if they were entitled as Prize Agents to five *per cent.*, they were entitled to the five *per cent.* at the time, I suppose upon the gross proceeds, for the act which reduces the allowance to five *per cent.* upon the net proceeds, was made after these transactions, and therefore, I take it, if they were Prize Agents, according to the usage, which is sufficient to make law, they are entitled to it upon the gross proceeds, if at all. Then they also claim to retain the interest on the balances in their hands, as Prize Agents. I do not know of any law upon that subject, and if I found no such law, I should be the last man in the world to give interest on balances, which would have the effect of giving a premium to keeping such balances in hand. That, however, it is not necessary to enter into here. I do not mean to say that the plaintiffs and their colleagues are to be bound by their delay in making this claim; but I cannot help feeling some surprise, that in the course of the enquiries before the Committee of the House of Commons, and their correspondence with the Clerks of the Privy Council, they should not have put their case upon this short point, but, in fact, they do not do so till the 29th of *September*, 1809. The points, however, are now brought before the Court by this bill, and we must dispose of them as well as we can.

The

The first point to be decided before we reach the merits of this case is, whether the Court has any jurisdiction? It was at one time thrown out by the plaintiffs, that the Auditors had no right to interfere in *these* accounts; because they were not, properly speaking, *public* accounts: but that was not insisted upon, for the plaintiffs would then have been asked, what right they had to apply to this Court to direct the Auditors in taking those accounts; because if the Auditors had no such right, this Court could have no jurisdiction. But a more formidable objection was afterwards taken by the Attorney General, to the jurisdiction of the Court. However, as his Majesty has been pleased to refer the subject to the Auditors of Public Accounts, I think, upon the best consideration that I can apply to it, that the Court has a jurisdiction in this particular case; and I am perfectly persuaded that those who urge the objection, would be very sorry if the Court did not act as if it had jurisdiction; for the Lords of the Treasury have expressly invited the plaintiffs and their colleagues to a legal decision, and they have promised to give them every assistance which could give any facilities to the obtaining a decision; and, indeed, this bill was filed in consequence of an arrangement of that nature made between the law advisers of the plaintiffs, and some of the law advisers of the Crown: and accordingly the Attorney General, instead of demurring as he ought to have done, if he meant to object to the jurisdiction of the Court, puts in, not the usual short answer, but a long and full defence. But as the present Attor-

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ney General was not in office at the time, it was, perhaps, his duty to make the objection which he has taken. I think, however, that it is the duty of the Court to remove that objection, and I am quite sure I feel no difficulty in persuading myself that the Attorney General would himself have been dissatisfied if we had not entertained this cause, coming to us, as it does, under these particular circumstances; and I think it would not be consistent with the honour of those who administer the government of this Country, to disappoint the plaintiffs, whom they have invited to the discussion, by turning them out of Court merely for a defect of jurisdiction in this Court, to which jurisdiction all parties seemed willing, in the first instance, to submit the case; but I think, independently of that consideration (which is applied only *ad hominem*), that as the question has been referred by his Majesty to the Auditors of Public Accounts, the Court of Exchequer, as the high Court of Revenue, and having inherent power, as I conceive, over the Auditors, have a right to dispose of the question.

Then arises the great question in the cause, — are these gentlemen Prize Agents? I do not mean Agents concerning a prize or prizes, but are they Prize Agents in the usual sense of the term, the King being their master and employer? and are they, as such Prize Agents, entitled (for in no other character do they urge that part of their claim) to the five *per cent.* upon the gross proceeds of the sales: and also to the interest

on


on the balances in hand which they claim to be entitled to, on other grounds. Now, are they Prize Agents in the usual sense of the term as between his Majesty and them? Down to a certain period, *viz.* the 15th of *September*, 1795, when letters of reprisal issued, they unquestionably were strictly and correctly Commissioners only, for the execution of business certainly of a very responsible and very important nature, but uncertain in its detail, in its labours and extent, and in its duration. No salary was appointed, no contract was made, nor was any treaty entered into for their remuneration; and I consider, therefore, that for such remuneration, the Commissioners necessarily relied on the discretion and grace of the Crown, and that they have no legal title to support a demand for any remuneration at all. That appears to me to be the law as applicable to this case. But whatever be the law as applied to the case of these Commissioners, they clearly were not entitled as Commissioners, nor do they claim, as such, to be entitled to five *per cent.* upon the gross proceeds. When war was virtually declared on the 15th of *September*, 1795, their strict character of Commissioners, as it appears to me, expired. His Majesty, however, was pleased to continue them in his employment. They then became Agents or Servants of his Majesty, and he was *alone* interested in the subject intrusted to them, and they were certainly his Agents or Servants of and concerning the prizes; but, as it seems to me, they continued so, (there being no new terms introduced or proposed)

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on the same terms as before. That appears to me to be the effect of the instructions to the Court of Admiralty of the 10th of *October*, 1795, which, I think, controul the meaning of the subsequent Order in Council of the 26th of *November*, and give it a construction consistent with the foregoing instructions of the 10th of *October*. To use the words which Lord *Eldon* is reported to have used in the House of Lords, in the case of *Lucena v. Craufurd*, "His Majesty, having the title to the property, makes them his Agents, and points out to them in what manner they shall exercise that agency, directing that it should be in the same manner as if they had derived title under the commission, and not under their special appointment as Prize Agents." In this view of the case; I confess, I find infinite difficulty in declaring that the plaintiffs and their colleagues have any legal title to maintain any claim as Prize Agents to his Majesty, in the common sense of that word,

I do not think that the case of *Lucena v. Craufurd* affects this case. That decides, or, at least, there is a great deal of argument preceding the decision to shew, that the plaintiffs and their colleagues were not Commissioners after the declaration of hostilities, and that therefore the verdict in their favour, on the first count in the declaration, in which they were averred to be Commissioners, could not be sustained; but there was another defect in the verdict on that declaration; for it referred to ships that were not within their authority.

authority. Then the subsequent verdict was not taken on any count averring them to be Prize Agents, but upon the count averring the interest to be in the King.

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Now let us consider, a little further, the situation in which these persons stand, as connected with his Majesty. Suppose they had in their hands no property of the Crown, and that they had not, therefore, the means of paying themselves as they have now. If they are entitled to succeed in this way, what proceedings could they *then* have instituted, with any prospect of success, against his Majesty? If they had no property in their hands, and the King had proceeded against them, they could not have set-off this demand against the Crown; for the statute of Set-off does not affect the Crown. But for the purpose of this judgment, I will assume that there is a debt to them from the Crown, and that they have a right to stay the hand of the Crown in this cause, until they are satisfied. Now even in that case, I think, from the evidence, it is clear they cannot be considered as Prize Agents in their sense of the word. Is there any instance in which the King has constituted a Prize Agent, with the privileges annexed to that Agent as between subjects? Has any Agent for prizes; appointed by the King, been held to be entitled, as against the King, to those privileges?—and has the law, as now administered on this point between subject and subject, ever been applied to the case of the Crown? No instance has been adduced, to prove it ever has been


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been so considered, and I have not myself been able to discover any. Yet a Prize Agent is a character pretty well known, and much marked; for by the act of Parliament of the 33 *Geo. III.* c. 66. s. 50, it is enacted, " that all appraisements and sales of any such ship or ships, goods, wares, or merchandizes, as shall be taken by any of his Majesty's ships of war, shall be made by Agents appointed by the flag officers or flag officer, captains or captain, officers or officer, ships companies or company, and others entitled thereto; that all and every person or persons who shall be so nominated and appointed Agent or Agents for any prize or prizes taken by any ship or vessel of war, or for receiving the bounty thereafter granted, and which prize or prizes shall be condemned in the High Court of Admiralty in *Great Britain*, or in any of the Courts of Admiralty in any of his Majesty's plantations in *America*, or in any other of his Majesty's dominions where the said prize or prizes shall be condemned, shall exhibit or cause to be registered in the same, his or their respective letter or letters of attorney, appointing him or them Agent or Agents for the purposes aforesaid;" — then the Registers of the Court of Admiralty are directed to enter the letter accordingly. So we find that they are persons constituted in a very formal manner, and with very particular directions concerning their conduct.

It really seems to me, that by the contract originally, such as it then was, whatever it might be, and whatever were the original terms between the

the public and the plaintiffs and their colleagues, those terms continued as between his Majesty, when he became their master, and them. It also appears to me that they cannot be called Prize Agents in the proper and technical sense of the expression, and in the sense in which they must necessarily use it, because they do not come, in any degree whatever, within the statute of 33 Geo. III. c. 66. s. 50. Then, if they are not Prize Agents, there is an end of their claim of five *per cent.* upon the gross proceeds, or upon any proceeds, and then their title to interest, as Prize Agents, must also fall.

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But then they claim interest on the balances in their hands, and compare their case to that of Receivers General, &c. But surely there is a great deal of difference between the office of Receivers General, even supposing they are not chargeable with interest, and the employment of these plaintiffs. These gentlemen are Agents appointed for the purpose of receiving money for their employers. Receivers General, by a long habit and course of business, have not been called upon to pay interest, it being, perhaps, understood to be the implied contract, that they are not to be called upon to pay interest, but merely to produce the money when called for, as a banker does; but, however that may be, on this occasion it is not necessary to enquire into the law upon the subject of the liability of public officers to pay interest upon their balances, or what decisions there have been on that point. Here, the express direction of the  
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act of 35 Geo. III. c. 80. is, that the proceeds of the sales shall, after the duties and expences shall have been discharged, be paid into the *Bank of England*. They accept the service upon these terms; and can any one maintain, that if persons who otherwise would not be liable to pay interest in the usual course of law, accept an office under such a condition, they would not be liable to pay interest as much, as if they had entered into a contract to pay interest. It is said to have been proved, that the plaintiffs and their colleagues kept in their hands no more money than was proper and necessary; but it is very difficult to imagine these balances to have been necessary, under all the circumstances of this case, and if not necessary, it could not be proper to retain such large sums for such a length of time as to produce by interest 42,000*l*. It was much urged, that if they had not had those sums ready, under their immediate dominion, they might have been put to great inconvenience by persons calling on them for payment; one answer is, that if they had at any time wanted any part of the money which they had paid into the Bank, they could have been relieved by application to the King in Council, just in the same manner as every one of us knows a Court of Equity relieves an executor or trustee, who is liable in a much greater degree than these gentlemen were; for there is a great doubt whether they were subject to any action. The Court, in ordinary cases, very often directs persons to pay their money into Court, and, if an action should be brought against them, to apply for money to pay the amount which

which is demanded of them; and that was the clear course here; I think, therefore, that is an answer as to the hardship of the case. But, whatever the hardship was, there is another short and more decisive answer, that the act of Parliament under which they acted, and which bound them as much as acts bind every body else, directed the payment of the money into the *Bank of England*. Now, if the act directed the payment of the money into the *Bank of England*, so did the instructions which proceed on the authority of that act of Parliament, and therefore there being a law which makes it their duty, they were bound to obey the law;—if they are bound to obey the law, shall they then obtain an advantage by not doing so, and by keeping the money in their hands? Clearly not. I am therefore of opinion, and I believe the Court concur with me, although perhaps, not precisely for the reasons I have expressed, in so thinking, that the plaintiffs are not entitled to interest, either as Prize Agents, or as by analogy with any other officer to whom, in the argument, they have compared themselves.

It was said, and urged strenuously, that these balances — these monies, were not the monies of the Crown — that they were undetermined property which might, perhaps, in the event, be adjudged to belong to other people. But the course of business is not according to that argument. If a person, for instance, has money paid into a Court of Equity, to be distributed hereafter, the person who commands and controuls the money, is the person to  
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whom the interest is to be ultimately paid, unless other people are specially entitled to the interest upon it. These gentlemen were the Agents for the Crown, and for the public,—they were bound to pay the money into the Bank, and if they did not pay it into the Bank, they may be called upon for interest. Are they to put the interest into their own pockets? Clearly not; the persons who employ them, are the persons *prima facie* entitled to the principal, and also to what is derived from the principal, namely, the interest; the persons who receive it from them may be called upon by other parties to account for that interest, but as between the agent and principal the principal is entitled to the money in the Agent's hands, and also to the fruit which he derives from it contrary to his duty.


That being our concurrent opinion with respect to the interest, the Court is then called upon to give such directions as shall secure to the Commissioners a fair and just remuneration for their trouble;—they, in all respects, proceeding upon the allegation that the auditors have not allowed them nearly what they deserved, and what ought to be allowed to them. Now what remuneration they may deserve cannot, as it appears to me, be ascertained by any proceeding in frequent or familiar occurrence in this Court. We cannot, as I conceive in this case, compel the Crown to try an issue of *quantum meruit*, and I think we cannot refer a question of *quantum meruit* to the Deputy Remembrancer;

cer; the Deputy Remembrancer is not the constitutional officer, but the subject has been already before the proper and constitutional tribunal: and all that this Court, as a Court of Revenue, could do in such a case as this, would, I apprehend, be to correct and guide the judgment of the Auditors, and to order them to review and alter their report if we thought they were wrong; but then the plaintiffs must satisfy us that the report is clearly erroneous, and they have furnished us with no means of ascertaining whether it is erroneous or not; we have no *data*, and we cannot act upon conjecture or surmise. To some, the remuneration already allowed may appear 'an ample compensation, whilst, to others (not that I wish decidedly to express that I exactly agree in that opinion, if such an opinion exists) it may be said that it appears to be a too scanty allowance; but there is no ground on which either the one or the other opinion can rest; there is, in short, no evidence to warrant us in coming to a judicial determination. I cannot find that there is, throughout this cause, any foundation upon which I can erect the proposition, that the Auditors have done wrong. That there ought morally to be a sufficient compensation made to the plaintiffs, is beyond all doubt; but whether that which they have been allowed is sufficient, or not, I protest, for one I have no means of knowing. The plan of taking the accounts proposed by order of the Privy Council, by their minute of the 10th of *October*, 1810, was, as far as I can judge of it, the result of great attention to the subject, founded in excellent sense,

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sense, and calculated to do complete justice to all parties, and, speaking privately, which, perhaps, I have no right to do, I wish the Auditors had adopted it, as it must have carried satisfaction with it to all the world, and I own, for myself, that having taken, I hope, sufficient pains to understand the case, I cannot survey the enormous multiplicity of business of the most important nature, performed by the plaintiffs and their colleagues—and performed with great diligence, industry, integrity, and talent, that no person, who understands the matter, has even suggested any blame or objection to the progress, or any defect in the execution of it,—I say I cannot survey it without a sensation of uneasiness, because I cannot help suspecting, that a sufficient allowance has not been made to them; but I cannot, with the lights I have, be certain that this is a correct view of the matter,—it is only my private conjecture, and I cannot act upon it.

Upon these general grounds, I believe, we all agree, however we may differ as to the particular reasons; for I have not the honour of knowing whether there is any difference in our reasons; but I believe we all agree on these general grounds, in thinking that this bill must be dismissed.

GRAHAM, *Baron*.—I am so entirely of the same opinion in the main with my *Lord Chief Baron*, and particularly so very much concur in the concluding observation of his very learned illustration

illustration of the case before us, that if I had not understood from my Lord Chief Baron himself, that he wished something should proceed from the other Judges of the Court, in respect to the general nature of this bill, I should not have been disposed, upon the present occasion, to say a single word: but—as the general subject of the jurisdiction of the Court in such a case as this, and the form of proceeding by bill in particular, are matters of very considerable importance — perhaps my Lord Chief Baron and my brother Judges will forgive me if I also signify my opinion, and my general view of the nature of this application.

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I consider then this bill as one of the first impression. It is contrary to every notion I have been able to form of the jurisdiction of this Court, in the course of now a pretty long attendance upon it. This application must be considered as made to us, on the part of the plaintiffs, as sitting in a Court of Revenue, and in a Court of Public Accounts; and if this matter be admitted to be a fit subject for the cognizance of this Court, it strikes me that it cannot be brought before us as a Court of Equity, but as a Court of Law, sitting on questions of public accounts: and the only possible way in which I can conceive that the subject-matter of this bill can be brought within our jurisdiction is, upon an application to be made in a summary way by motion, and not by bill, by the persons who now sue as plaintiffs, claiming these sums as allowances in their accounts, contrary to the determination, or to the

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opinion of the Commissioners of public accounts. That is the only shape in which, as it appears to me, that it could properly be brought before the Court; but to file a bill in Equity on the equitable side of the Court, for such a purpose, appears to me to be quite a wild notion; for if the plaintiffs have any merits, it is impossible to say they are of an equitable nature; or that they come under the equitable cognizance of this Court. This is the view that I have taken of this case, and I wholly accede to the reasons which my Lord Chief Baron has urged for our now entertaining this suit at all, because, according to my apprehension, we have no original jurisdiction to receive the application on a suit by bill. I know of no original jurisdiction which this Court has, sitting as a Court of Revenue, to deal with matters that do not affect the King's ordinary and extraordinary Revenues, of which I consider that these Droits of Admiralty form no part, and I have never been able in the investigation of this particular subject, and many others of the same sort, to fall upon any hint or intimation that this Court ever took up the consideration of questions which relate to the King's privy purse. With respect to these Droits of Admiralty, all questions arising upon them belong properly to the Courts of Prize, and more particularly to the Court of Admiralty, in the first instance; but when my Lord Chief Baron suggested to me (and this is the ground on which I have gone in the first instance), that this may have been brought within our cognizance by the invitation of those concerned in the administration

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tion of these affairs, namely, the Lords Commissioners of the Privy Council, and the part which has been taken by the Attorney-General, I, for one, do not refuse the acceptance of the jurisdiction which, perhaps, the King may by his own authority thus throw upon us: and as his Majesty has been pleased to refer the administration of the produce of these funds (though they do not primarily belong to the King's ordinary or extraordinary revenue), to the Auditors of public accounts, that circumstance may have brought it within our jurisdiction to consider whether the Auditors of the public accounts have done right in disallowing the claim made on the part of the plaintiffs. I am, therefore, very ready to withdraw the objection that would, according to my mind, have arisen to this bill, observing only, that if a demurrer had been, in the first instance, put in, it appears to me that there must have been an end of it.


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Having thus expressed my opinion that this is an anomalous bill, and one of first impression, and that, as such, it cannot strictly be sustained on any ground whatever, yet, taking it up incidentally, after the example of my Lord Chief Baron, I should be willing to go into the case, and give redress, if we can give redress; but it is beyond the compass of my mind to come to any kind of resolution or decision on it as it stands. I perfectly agree with my Lord Chief Baron, that we have but two modes by which we can come to any decision at all. It is, strictly speaking, a bill of *quantum meruit* brought by

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these persons as Agents for the Crown; for as to their being Prize Agents, there is no pretence whatever for saying they were placed in that character by the act of Parliament, the acts of the Privy Council, or the acts of the King. They are entitled, perhaps, to some remuneration, though I very much doubt, in my own mind, their having any thing like a legal demand originally. They had no legal right when the question was in suspence to whom this property should belong, whether to *Dutch* or *English* owners, or ultimately to the King. The King's authority was doubted as to the commission, though I should not, perhaps, have doubted it myself; but the King appointed these persons Commissioners, and I cannot distinguish this commission from other commissions. Ultimately, when war was declared, it became the profit and the private money of the King, and even if these persons, from that time, were the Agents of the Crown, and if they should be entitled legally to any thing, there occurs a very great difficulty as to how they are to call upon the Crown; I know of no means by which, even if you suppose them to have been appointed Agents for the Crown, they could sue the King in any other way than the Constitution points out, which is by petition. We have no right to command the Crown, and I do not know any other means by which these parties can call upon the Crown to do them justice, than by petition of right.

But suppose, in the form in which it comes before us, we were to say the Crown has given us the  
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power *pro hac vice* to decide this question, there is still no means of deciding the particular matter, which is a mere question of *quantum meruit*, except either by a reference to the Deputy Remembrancer, and he, I agree with my Lord Chief Baron, is perfectly incompetent, and is not the constitutional officer : — or (which is our only other mode) by sending it to an issue; and that it is impossible to say the Crown could be compelled to accept or defend. If the Attorney-General were to say, I will not submit to appear to such an action, we have no power to controul the Attorney-General, and say that he shall appear. Then it comes to this, — we are, perhaps, called upon to say that the Auditors have done wrong, and upon that I cannot, as I agree with the Lord Chief Baron, take upon myself to say they have done wrong; I am perfectly clear they have done right in some respects, as in not considering the Commissioners upon the footing of Prize Agents, as entitled to the extent of remuneration they require, and also in not allowing them the interest on the balances in their hands. I will not, however, go further; I did not intend to have said so much, but I must declare my opinion that this Court has no right, under this proceeding, to command any thing. We can only concur in that very impartial and proper recommendation on the part of my Lord Chief Baron, every expression of which conveys the meaning of myself and the Court, much better than any language that I can affect to use. I conclude with saying, that in the present suit this Court has not the power of making such a decree as is prayed —

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to declare that the plaintiffs have a legal right to call upon the Auditors peremptorily to allow the sums demanded and disallowed, which is utterly out of the power of the Court: and therefore this bill must be dismissed.

WOOD, *Baron*.—As my Lord Chief Baron has delivered the judgment of the whole Court, being the result of previous consultation amongst ourselves, I did not expect that each Judge would be called upon to give his single opinion, and consequently I am not prepared to go through the whole of the case; I therefore shall content myself with saying that I concur, as I have already expressed to them in private, with the Lord Chief Baron and my Brothers, in the judgment that has been delivered.

GARROW, *Baron*.—If there had been any difference of opinion in the Court, I should have thought it becoming in me not to deliver any opinion at all, but as I individually concur, not only in the judgment which has been delivered by my Lord Chief Baron, but in the reasons; and as the unanimous opinion of a Court carries with it (however constituted) something more of authority than when any one of the Judges have not delivered any opinion, I am desirous of saying now that this case has arrived at its conclusion, that I entirely acquiesce in the judgment which has been delivered by my Lord Chief Baron and my Brothers.

*Per Curiam.*

Bill dismissed.

669.357 EASTER TERM, 43 GEO. III.

*Ex parte* COLEBROOKE, Bart.\*

Petition.

THIS petition—which was presented (16th *May*, 1800,) by one of the plaintiffs in the case of *Colebrooke v. The Attorney-General* (which immediately follows the present), on behalf of himself and the other persons interested in the contracts therein mentioned—prayed a declaration by the Court, that the Accountants ought not to be charged by the Auditors of public accounts with the sum of 57,725*l.* 16*s.* 5½*d.* the alleged value of provisions delivered over to them: (they undertaking to stand charged with the sum of 34,688*l.* 7*s.*) and that they ought to be allowed the sum of 40,232*l.* 19*s.* 7¼*d.* with which they had been surcharged by the Auditors—and for the necessary directions—and that all process might, in the mean time, be stayed.

The Court, on motion supported by an affidavit, verifying the allegations of the petition, granted an order (16th *May*), requiring the Commissioners for auditing the public accounts, to shew cause why this Court should not so declare and direct as prayed—requiring the order to be served on the Attorney-General.

\* See the note to the next case.

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Friday,  
20th May.*Practice.*

Whatever jurisdiction this Court may have in controlling the judgment of the Commissioners for auditing the public accounts, in regard of allowances or disallowances and surcharges, alleged to be unduly made by them in favor or to the prejudice of the accountant, they will not interfere in a summary way on petition and motion, but the party complaining must file his bill.

*Jurisdiction.*

On the question of the jurisdiction of the Court, and the mode in which redress should be sought vide the subsequent case of *Colebrooke and others v. The Attorney-General* and *others*.



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The *Attorney-General* (*Mitford*) now shewed cause.

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*Plumer, Best Serjt. and Fonblanque*, supported the order: and the *Attorney-General* replied.

[The arguments on either side appear to have been somewhat to the effect, but not to the extent detailed in the following case of *Colebrooke v. The Attorney-General*. They are therefore omitted here; but as the Court did not give any reasons for their decision in that case, the judgment delivered on the present occasion, by Mr. Baron *Graham*, with whom, on the question of jurisdiction, the Court ultimately, on more deliberate consideration, coincided, having been rendered much more important, is therefore stated fully.]

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30th May,

The Court having taken time to deliberate, this day delivered their judgments *seriatim* \*.

*GRAHAM, Baron.*— having stated the object and nature of the application — When this matter came before the Court, it was opposed upon much argument upon the merits of the case — that is to say, upon the question, whether the Commissioners had done justice upon this occasion — and it was opposed also on the ground that this Court has no legal or equitable cognizance of the

\* The Reporter has not been fortunate enough to obtain a note of the judgment delivered by the Lord Chief Baron; but as his Lordship is said to have doubted, upon that occasion, the jurisdiction of the Court altogether, it is of the less consequence perhaps, since the subsequent determination of the Court, in *Colebrooke v. The Attorney-General*.

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subject-matter: or if it has, that it cannot give relief upon this summary mode of application.

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The manner in which the public attention has been called to this subject, has rendered it necessary for the Court to give its opinion upon this great point, — whether, after an account has been prepared by the public Auditors of the kingdom, the public and patent officers of the Crown, and stands ready for final declaration by the Chancellor and Under Treasurer of the Exchequer, and the Lords Commissioners of the Treasury that account can be sent back to be altered or corrected, either in its general statement of the balance, or in any particular item of it, by any controlling power inherent in this Court: — and secondly, (if it can be done by any mode of proceeding known to the Court) whether it can be done in a summary mode like the present, namely, by motion, upon a petition, supported by affidavit.

The consideration of the first question is undoubtedly extremely important, and I have very earnestly to request the indulgent patience of the Court while I go into the ground of that opinion in which I unfortunately differ from my Lord Chief Baron and my two other Brothers; with real diffidence, at the same time, of my own opinion, when it is not only opposed to theirs, but to the very able and ingenious arguments and research which have been offered, in support of the contrary opinion to that which I am now endeavouring to maintain.

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The consideration of a subject of this sort, in spite of every effort to reduce it, necessarily takes me into a very extensive field, but it shall be my study to treat the subject with all the brevity that it will admit of, and more particularly so, because the greatest part of it has already been canvassed most ably and most learnedly. As far as in a subject of this sort we are instructed by *Madox*\* and the several able authors referred to by Lord *Coke*, in 4 *Inst.* 103. we certainly go upon sure grounds; but that information stops very short of any satisfactory conclusion; because it is clear, that in those early times, the executive and judicial powers of the Court were not marked by any clear line of distinction. In the times to which those writers, particularly the former, refer, and when the King's Chief Justicier ceased to preside at the Exchequer, the Lord Treasurer, the Chancellor, and others of the King's Council, sat with the Chief and other Barons, in the Court of Exchequer, by which I understand, as well the Court of Pleas of the Crown, as the Court of Pleas between party and party. During some portion of that period, the Chamberlains sat also; but it is not necessary to go into any learned discussion of the nature of their office, because it is clear from Lord *Coke* that the Chamberlain had long ceased to be a judicial officer of this Court. The business of this Court was then done by the Barons, and they were often not lawyers, as is clear from an act in the 14th of *Edward III.* regulating com-

\* Vol. ii. cap. xxi. sect. 1. and cap. xxii.

missions of *Nisi Prius* in the several counties. There is, in that act, this provision, that if it happens that none of the justices of the one bench nor the other, may come into the country, whose inquests or juries be to be taken, then the *Nisi Prius* shall be granted before the Chief Baron of the Exchequer, if he be a man of the Law. So that it is clear, that even at this period, the Chief Baron was rather a political character, than that legal officer which he is now, as Chief Judge of the Court. This appears more strongly, if it were necessary to discuss it for the present purpose, from Lord *Coke's* comment on the *Mirror*, which I will just repeat, by way of shewing more distinctly what really was the state of the Court in those ancient times. (vide 4 *Inst.* p. 109.) Lord *Coke*, in point of fact, carries his information in respect to the real jurisdiction of the Court, as applied to matters of this sort, not very far in his comment; for the greater part being comments upon *Britton*, and upon the *Mirror*, the passages he refers to, allude to a time when the whole business and jurisdiction of the Court was different from what it now is [his Lordship read the several passages referred to, from p. 103, to p. 113.]

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In commenting on the accounts that were then taken, Lord *Coke* assumes, that the accounts, as they were originally taken, comprehended those which afterwards fell within the department of the auditor of the Prest, for he mentions the accounts of the Treasurer of *Ireland*, as forming a part of them, (p. 113.) and mentions, as the only exception

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exception of the persons accounting in this Court, the Treasurers of the King's chamber. At that early period, therefore, it really does seem as if this Court, constituted as it then was, superintended the public accounts, and in most instances, transacted in open Court, all the business of such accounts in the kingdom, including those of the Prest, as well as all others, excepting *Ireland* which never did fall within the province of the Court in the early establishment. But now, from the great and necessary change which the business of this Court has undergone since, the political character of its members has been distinctly taken away from the judicial character which they at present assume; and in many respects the Treasurer and the Chancellor of the Exchequer, who originally formed a part of it, and sat in Court here with the Barons, have taken and confined themselves to the business which more peculiarly belongs to them, namely, the administration of the Revenue of the Country; for when it is once received into the receipt of the Exchequer, the proper department, the judicial authority and controul of this Court ceases.

At the time when Lord *Coke* wrote, it will appear, that most incontestibly, the proper and sole Judges of this Court, with respect to pleas of the Crown, and pleas as between party and party, were the Barons of this Court to the exclusion of the Lord Treasurer. It will appear likewise, by a further reference to Lord *Coke*,  
(4 *Inst.*

(4 *Inst.* 118.) that the Lord Treasurer, the Chancellor and Barons of the Exchequer were, in his time, and are to this day, if it should please his Majesty to constitute a Lord Treasurer, the proper Judges of Equity in the Court of Exchequer. It is clear too, that the Lord Treasurer was one of the Judges, as was the Chancellor, with the Barons, in the Court of Accounts. I apprehend, as appears clear from various passages in Lord *Coke* which it is not necessary to go into, that the Court of Accounts, of which the Lord Treasurer was the President, was not a Court of justice. They had no judicial power, independent of the Chief and other Barons of the Court; although, in the ancient Court of Accounts in this Court, the Lord Treasurer had a right to preside, and the Treasurer of the Exchequer, who was generally also the Chancellor of the Exchequer, also sat there. - These two officers were confounded together for a long period, but with regard to the Court of Accounts, it is plain that the necessities of other business had taken great part of that branch totally out of the immediate management of the Court.

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When the Court of Accounts sat here as a Court to take accounts judicially, the Accountants were actually either brought into Court, or commissions issued under the statute of *Henry VIII.* empowering certain Commissioners to enquire into the state of the accounts, and report them here. But though the Court of Accounts is still an existing Court, it is not an effective Court, because the business of the Nation having

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so greatly increased from the vast extent of the pecuniary concerns of the subjects of the kingdom, it has transferred that duty to another department.

Having said already so much upon that head, I shall next endeavour to find out what the jurisdiction of this Court is, by as short a reference as possible to the several acts of Parliament which have taken place, regulating that jurisdiction, and defining in what cases this Court should, or should not interfere. The first act which I will refer to, is the 20th of *Edward III.* cap. 1 & 2. The accounts of public Accountants were then taken in the manner which I have already been describing, and no allowances were made upon any occasion, without the writ, and without the order of the King. By that statute, the power of the Treasurer and Barons (for at that time the Treasurer sat as a Judge in this Court) was enlarged. It appears by the first act, that the writs and mandamuses from the King to do right, and in some cases to forbear to do right, had been sent to other Courts, as well as to the Exchequer, for the statute says,—“First we have commanded all our justices, that they shall from henceforth do equal law and execution of right to all our subjects rich and poor, without having regard to any person, and without omitting to do right for any letters or commandment which may come to them from us.” And then the act goes on to prescribe the form of the oath to the justices. Then follows

follows the act (ch. 2.) relative to the Exchequer. "In the same manner we have ordained in the right of the Barons of the Exchequer, and we have expressly charged them in our presence, that they shall do right and reason to all our subjects great and small, and that they shall deliver the people, reasonably and without delay of the business which they have to do before them without undue tarrying, as hath been done in times past." It is to be observed, that this is particularly addressed to the Barons of the Exchequer. It seems, however, that notwithstanding this positive and particular direction to the Court of Exchequer, they still persevered in their former practice, because it became necessary in a later period, in the 5th of *Richard II.* (ch. 9.) to repeat these injunctions, and to repeat them to the Court in a more positive manner.

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I should previously have noticed one document, which perhaps I might not have rested very confidently upon, if I had not found it had been made very particularly a topic of argument both by Lord *Somers* in the celebrated Banker's Case in the 11th volume of *Hargrave's State Trials*, (pp. 136 and 150.) and is referred to by *Holt* and Lord Chief Justice *Treby*, and that is, the oath which the Barons take here in Court. The second article is — "That well and truly, he (the Baron,) shall charge and discharge all manner of people, as well poor as rich." Now this oath undoubtedly is taken by the Barons at this day, and I own it strikes me as affording a strong argument



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argument in favour of the jurisdiction; and I shall be found supported in this by the great authorities to which I have referred in that case. And it would be a very extraordinary position, to maintain, that where the Barons generally take an oath that they shall truly charge and discharge all manner of people, it must at this day, be with an exception of that very large class of persons who are concerned in the immense contracts by which the supply of our armies and great military establishments is to be furnished. One would expect at least something exceedingly strong that should make it the habitual and customary law of this Court, to construe an oath conceived in terms so general as that is, with an exception so extensive and important.

The next statute in order of time, is the 5th of *Richard II.* ch. 9. and that undoubtedly does give great force to the argument I have been urging, arising from the oath; because it is difficult to conceive words more general than the language of that statute is, giving to this Court a supreme judicial authority over all matters where justice was to be obtained by one party against another, whether Accountants of the King or not. That statute recites, that "Because that grievous complaints hath often times been made of the officers of the Exchequer, for that the heirs, executors, occupiers of goods and land tenants of divers persons which have been impeached in the said Exchequer of debts, accompts, and other

other demands, and which, although they have offered them there to shew or plead for their discharge of those impeachments according to the law, they have not been always thereunto received heretofore, without having express commandment by writ or letter of the great or privy seal, to the great disquietness, mischief, and delay of the said persons impeached, and no advantage to the King." It is perfectly clear, therefore, that up to the 5th of *Richard II.* notwithstanding the former statutes I have referred to, individuals, who were Accountants to the King, could not obtain even their ordinary discharges without a particular mandate from the great or privy seal. Then it proceeds thus: "It is ordained and assented, that the Barons of the said Exchequer shall, from henceforth, have full power to hear every answer of every demand made in the same Exchequer." The Treasurer is not mentioned here, nor Chancellor of the Exchequer, to have this power, and the prior acts had clearly lost sight of the Treasurer as a judicial officer sitting in the Court of Pleas. Before this time, about the period of the 20th of *Edward III.* the Treasurer was no longer considered as a judicial officer of this Court in any of the extensive business of the pleas of the Crown, or pleas between party and party. The act then proceeds, "so that every person that is impeached or impeachable of any cause by himself, or by any person shall be from henceforth received in the same Exchequer to plead, sue, and have his reasonable discharge in this behalf,

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without tarrying or suing any writ or other commandment whatsoever."

Now, without affecting any thing like clearness in a case of this sort, after what I have heard, it strikes my mind that this act does mean to give to the Court of Exchequer as a judicial Court, the fullest latitude to hear every answer that could be made. It is not pressing the present subject too far, to say, that here, there is a demand made on the part of the persons who make the present application;—for they state themselves to be charged with 55,000*l.* as the value of provisions which they say is greatly beyond what they ought, under the circumstances, to be charged with;—and they say the Auditors have deducted from their demand 40,232*l.* which they ought not, because they have proceeded upon a mode of calculation adapted to another view of the circumstances and another state of things, and which would be injurious to the complainants, if applied to the particular mode in which, from the necessities of Government, these provisions were at that time supplied by them. Surely that is a sort of demand from the subject which requires an answer, and I protest it is novel to me, that a subject of any country, and particularly of a country where Courts of Justice are so singularly and peculiarly accessible as those of this country are, should look for an answer to such demands to any other place than to a Court of Justice.

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I have been induced to dwell a little upon this part of the case, because I find myself confirmed exactly by the same authorities to which I have referred, and shall refer generally, namely, the Judges who delivered their opinions in the Banker's Case. Whoever follows my argument, will find it is supported by those very high authorities, Lord *Somers* and Mr. Justice *Treby*, who there reason from this statute, although with a different view and on a very different subject-matter from the present — namely, in respect of the province and authority of this Court as a judicial Court, sitting in the receipt of the Exchequer Revenue, to issue money which had been received into the Exchequer — yet their general reasoning upholds my present position, for they admit throughout, that whilst the debts and accounts of the Crown are *in transitu* through the Exchequer, the Court of Exchequer have full power over them. And indeed it must be necessarily competent to the Court from which and under whose sanction every process issues, to look through the subject-matter for which they cause their summary process to be issued. We are no longer a Court of Justice, if, on putting our *fiat* for an extent, we are not to see whether so much is due from the subject or not; or if we are bound to adopt the conclusions of others who are not a Court of Justice. Those great Judges will be found arguing from this statute, that there was no doubt that the Court had the power in its judicial character to hear every answer of every fair and reasonable demand both in law and equity, which the subject might have.

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So the matter rested, till the statute of the 33d of *Henry VIII.* c. 39. introduced a new mode of recovering debts of the Crown. That statute put every bond and every specialty to the Crown, in the situation of a statute staple as to every purpose of its remedy; but when this act had introduced these new advantages to the Crown, by such mode of enforcing the debt of the Crown, it adverts to the possible cases in which these debts might be answered on the part of the subject, and very anxiously makes provision for the subject's right in every possible case of debts of this sort being attempted to be enforced against them, and it gives power to the constituted Courts. My Lord Chief Baron has already stated, that the statute of the 27th *Henry VIII.* c. 27. had created a Court of Augmentations, and had constituted new officers for the purpose of enforcing the additional Revenue which, from the dissolution of the monasteries, had come to the Crown. The 79th section of the 33d *Henry VIII.* c. 39, provides, "That if any person or persons, of whom any such debt or duty is or at any time hereafter shall be demanded or required, allege, plead, declare, or shew in any of the said Courts," the Court of Exchequer having been mentioned as one "good, perfect, and sufficient cause, and matter in law, reason, or good conscience, in bar or discharge of the said debt or duty, or why such person or persons ought not to be charged or chargeable to, or with the same: and the same cause or matter so alleged, pleaded, declared, or shewed, sufficiently

ciently proved in such one of the said Courts as he or they shall be impleaded, sued, vexed, or troubled for the same; that then the said Courts and every of them, shall have full power and authority to accept, adjudge, and allow the same proof, and wholly and clearly to acquit and discharge all and every person and persons that shall be so impleaded," &c.

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This act therefore, while it introduced new remedies for the Crown, giving the proper and necessary privilege of the Crown for the enforcement of those debts, provides anxiously that the subject who was to be charged with them, should have every possible means of being heard in his defence: and it will be found, that several cases in Equity did arise soon after the passing of this act. One of those, the case of *Sir Thomas Cecil (a)*, will be sufficient for the present purpose, and that certainly goes a great way to shew how far this Court would give relief to parties against suits, as being within the purview of that act: and that it comprehends in terms, and empowers the Court to give relief in, many other cases than those of mere debts upon bond and other specialties; therefore the equity that is there given must apply to all actions of debt and to such as might arise in the course of such transactions as these, as well as to debts upon bond. *Sir Thomas Cecil* had conveyed an estate to *Queen Elizabeth*, to a part of which he had not at the

(a) 7 Co. 18.

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time a perfected title: and the bond which he had given to the Crown, conditioned for performance of the covenants in the conveyance of that part of the estate, as well as the rest, (one of which was, that he was well seized) became forfeited, and was put in suit by *scire facias*. No plea was put in to that bond, but Sir Thomas exhibited an English Bill in the Court of Exchequer Chamber, and upon that relief was given upon the particular circumstances of the case. Many other cases are cited in Lord Coke, where relief likewise was given upon the same ground, and the Court there also determined, that it was very proper for the purpose of obtaining relief in equity under this statute of 33 Henry VIII. to have recourse to the Court of Exchequer Chamber: so that if it be a subject-matter of equity, that is the proper place where it ought to be shewn; for if it were a subject-matter of plea, it should be introduced upon the record by plea to the *scire facias*.

If it should be said, therefore, that this present application is not in the case of a bond to the King, or of a debt which arose by reason of any matter or power, or things relating to the several officers who constituted the Court of Augmentation, I answer, supposing Government had refused to enter into a contract with the applicants until they had obtained sureties, and that those persons who had given bond for the contractors, were afterwards sued by *scire facias* — would it not have been compulsory upon the Court, under this act, to have heard either the plea

plea of the party to that *scire facias*, or at least to have heard, according to the authority of the case of Sir *Thomas Cecil*, in the Exchequer Chamber, what the party had to say in answer to the suit on the bond? If that be so, it strikes me as an exceeding strong argument, to shew that it does not alter the equity or right of the party, that it comes before us in another shape.

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Then by the 13th of *Elizabeth*, ch. 4. all their lands, tenements, and hereditaments of any kind, are made subject to the payment of the debts of persons of the description mentioned in the act, which is very general, and I believe it could hardly be contended that it does not comprehend persons of the description of those who are at present before the Court. It enacts, (sect. 7.) "That all and singular lands, tenements, and hereditaments, which any Treasurer, Receiver, Teller, Customer, Collector, Officer, or Accountant, before-named, hath heretofore, since the beginning of the Queen's Majesty's reign, purchased, or caused to be purchased, to the intent the same should not be liable as is aforesaid (the fraud and covin aforesaid being first found by office or inquisition), shall and may be liable to the Crown debt." Now it seems perfectly clear, that if these accounts should be declared by the Chancellor and Lords Commissioners of the Treasury, any extent or process issuing in consequence of that, under the authority of this Court, would affect the lands of those persons. Then, if they are within the act as



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to that, it seems to me they are within the act for the purpose of obtaining the redress and equity which that statute acknowledges to be their right by this provision in the second section that—"if any Treasurer, &c. or other accountant which shall receive or be chargeable with any money or treasure of our said Sovereign Lady the Queen, her heirs or successors, and shall, upon the determining of his or their account, (*all his and their due petitions to them upon the same account being allowed*) or by reason of any farm as aforesaid, be found in arrearages, or to owe unto our said Sovereign Lady the Queen, her heirs or successors, any sum or sums of money, and shall not, within the space of six months next after his or their accounts finished, or debt known, (*having allowance of his or their due and reasonable petitions as is aforesaid*) truly satisfy and pay all such arrearages and sums of money as he or they shall owe, upon determination of his or their account, &c. it shall be lawful for the Crown to make sale of so much of such Accountant's lands, &c. as will satisfy the debt or arrearages to be determined and adjudged upon his or their account or farm as aforesaid (*all due petitions being allowed as aforesaid*)."

Now this act, it is quite clear, recognizes the subject's right of petition, and it may be said, that his petition must be personally to the Queen, or her successors. The act however, is perfectly silent as to whom this petition should be addressed

sed—whether personally to the Queen or her successors, or to the Court. But I take it to be extremely fair and just reasoning, that if it is to the Queen, it must be to the Queen doing justice according to the laws of the realm, and proceeding to a final determination and adjudication, which she can only do by the Judges of the land. Then it would let the party in to prove a case in equity, where he may have the opportunity of shewing that he has been overcharged, and then it would be, if a petition of right, of course referred to some judicial authority — either to the Lord Chancellor or the Judges of this Court. And if, by this statute, we find that the persons accountant should have all their reasonable petitions, we must receive them, in whatever mode they come to this Court. At all events, thus much is clear — that the debt is not to be enforced as against their land, so long as they can shew grounds to the contrary, to a Court having competent authority to decide upon it — to a Court having a judicial character and functions. I do not mean to say that this goes the whole length of both the questions, but it goes a great way to establish that no debt of the Crown shall be enforced to the extent to which this act means it shall be enforced, so long as the party has a reasonable petition to offer to the contrary — which reasonable petition he should offer to this, or to some other Court having a judicial character and authority.

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Certainly

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Certainly these acts of Parliament were made at a time when the business had not completely got into the present course. The employment of contractors, and the imprestation of large sums of money to them, is comparatively of very modern date, but however comparatively modern that mode of contracting may be — unless any particular act of Parliament has placed these contractors as debtors to the Crown, in any situation less favourable than any other debtor or accountant to the Crown — these general words in this statute, in my opinion, certainly do comprehend them.

The course of proceeding by *scire facias*, is, in great measure, to be traced in Chief Baron Gilbert's book on the Court of Exchequer, pp. 97, 98. and it will be found there, that from the earliest time at which we know any thing of the practice of the Court as against debtors of the Crown, there has been a constant indulgence to the debtor, in affording him an opportunity of making his just and reasonable defence — so much so, that it is extremely well known to be the course of this Court, that although whatever bonds are entered into since the 33d of Henry VIII. may be sent to the Remembrancer, and being then delivered into Court, become from that time, debts of record, — because the bonds of the King have all the benefit of being debts of record, since they were put upon the footing of a statute staple; — yet the ordinary process is to sue out a *scire facias*, to which the party may come and plead within

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within four days; if indeed he do not, he is concluded, and the Crown is entitled to judgment. So, by the practice of this Court, although the constant rule is to issue the extent in the first instance; yet an inquisition is then taken upon it, and the party is let in to plead in the fullest manner, that is, he is let in to say that the debt is not so much as you have awarded process for, and such a plea must necessarily let the party in to say, I am overcharged. That is the effect of the mode of proceeding by *scire facias* and by extent. There is a case in *Hardres*, (p. 324,) *The Attorney General v. Hutchinson and Pococke*, which seems to me to establish this position, that even in the King's debts not on bond, but arising in the manner in which this does, the Court has, at some periods, been in the habit of letting the party in to plead. In that case the proceeding was a *Scire facias* due upon account for 2272*l.* to which they pleaded the act of indemnity, and the Attorney General having replied the act of vesting, the defendants demurred against *any* demand. According, therefore, to the practice in this Court, it seems to me that there would be nothing at all unreasonable, but that it would be *ex debito justitiæ*, if the party really had a fair defence to make, — to suffer him, before process of extent issued for the debt of the Crown, if he could shew that so much was not due, to be let in to plead in that case, as well as in the case of bonds given to the King, and delivered into this Court, which are clearly debts of record, and other debts of record where the proceedings are by *scire facias*.

But

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But undoubtedly, it is said, and with great force of argument, that there is no instance whatever of the interference of this Court in a case like the present — that there is not only no instance of any interference of the Court in the stage in which this case is now, but no instance of any interference of the Court pending the taking the public account before the Auditors, as constituted by the 25 Geo. III. or even as they were before that act\*. I cannot but say, I feel the force of that argument very strongly, but at the same time I cannot go along with the Court in supposing that there was any particular period in which their original jurisdiction was by any express law taken away. The principal authority I hear of for that, is the authority of Mr. *Fanshawe*, and I will just offer a few observations upon the passage which Mr. Attorney-General particularly relied upon, to shew, that whatever was the jurisdiction of this Court in that respect formerly, this part of it has been entirely separated and placed in hands totally distinct. The late Attorney-General, of great learning and great ability, we all perfectly well remember, had no better authority to satisfy the Court that such had been the real state of the case, than a reference to this (Mr. *Fanshawe's*) book†.

\* *Sed vide infra* (*The Attorney-General v. Colebrooke*), where instances are adduced.

† This book, which appears to have been much quoted and relied on by the Attorney-General, in the argument on the present question, was not afterwards adverted to by him, in arguing the demurrer, in the next case of *Colebrooke v. The Attorney-General*.

My

My Lord Chief Baron has truly stated that this Mr. *Fanshawe* was King's Remembrancer of this Court — a man therefore likely to have considerable information. His book was compiled by the express desire of Lord Treasurer *Buckhurst*, who succeeded Lord *Burleigh*. It is however remarkable that this subject, at least that subjects like the present, had been treated very elaborately in the Banker's Case — many excellent writers have written upon the subject of the jurisdiction of the Court of Exchequer — amongst the rest, and high amongst the rest, is Lord Chief Baron *Comyn*, who had the advantage of great experience in this Court, in addition to his very great general legal learning; and it is remarkable that neither the Banker's Case, nor Lord Chief Baron *Comyn*, nor *Gilbert*, ever mention Mr. *Fanshawe* as any authority at all with respect to the jurisdiction of this Court. Lord *Coke*, in the chapter to which I have referred, never once quotes *Fanshawe*, or mentions him, although he wrote subsequently to his book. I do not wish to detract from the credit of the book; but it is extremely material, that when so important a position as this — that the jurisdiction in matters of account, has been taken away from this Court — is attempted to be supported by citing his authority, to consider what degree of credit is due to it. He says, "the Auditors of the Prest, be those that take the account in the Exchequer" — I have no disposition at all to intimate, for it is not necessary, any difference of opinion from my Lord Chief Baron

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Baron who spoke before me on that particular point; but I should be inclined to doubt a little, whether the Auditors of the Prest were in fact first constituted in the reign of *Elizabeth*. I take it, the Auditors of the Prest must have been known officers of the Court; and he who writes in the reign of *Elizabeth*, speaking of the great known officers, could not be understood to be speaking of officers constituted by an act in that reign. The Auditors of the Prest are, I apprehend, as old as the other Auditors who audit in ordinary Revenue cases. *Fanshawe* then says, "these other persons, in order that the process might be made out upon them (that is, the Auditors of the Prest), now declared the same before the Lord Treasurer, the Chancellor, and the Under Treasurer only, but they were never entered in the Court of Exchequer, nor examined, nor written upon there, as they had wont to be."

Now, with great deference to the opinion that has already been stated upon this subject, this I take to mean nothing more than that the accounts now are not entered in the Court of Exchequer, nor examined, nor written upon as they had wont to be, meaning that then that was no longer the case; and that having got into another department, namely, before the Treasurer, the Chancellor, and Under Treasurer, they are only entered and declared there. I take it to be perfectly clear that that is the common course of business. But a question still remains, whether, although these accounts, from the little practicality

bility of their being taken in this Court, have now got into another channel, and although this Court cannot, in its present consitution, still take the public accounts, as a Master in his Chambers can do, and as they did before, and though they are entered into in the office of the Chancellor and Under Treasurer of the Exchequer, for the purpose of settling them in this stage, and ultimately declaring that the accountants, so far as they have adjudged, have done right — the question is, whether that is to be conclusive on the Court.

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To be sure, if my Lord Chief Baron is right in considering the declaration of the accounts by the Chancellor of the Exchequer as an absolute adjudication, and as a judgment passed, and only wanting to be sent down in the record to the Great Pipe, in that case it may be said to be final. But where do the Chancellor and Under Treasurer of the Exchequer sit as a Court of Justice? I have used the utmost diligence of investigation, and can find no Court of Justice in this Court that is constituted of Chancellor and Under Treasurer of the Exchequer. Without the Barons, the Chancellor and Under Treasurer has no judicial power whatever — he cannot issue process of any kind whatever — he cannot examine witnesses upon oath — he has no process to execute of his own judgment, but must refer to this Court. It strikes me, therefore, as a strong position, to say, that when they, who have no judicial character, have signed these accounts, when they come into this Court, that is to conclude the matter



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matter — that they should be considered as absolutely compulsory upon the Court of Exchequer, and that the Court should sit here merely as ministerial officers to grant the process upon declarations of this sort. One reason why I should, with deference, be disposed to doubt that, is, because in the earliest times the public accounts of the kingdom, and the accounts of the Prest, were declared by the officers of the Crown, for they were the persons who, in the first instance, had the examination of them. There is a valuable document in *Rymer*, vol. x. folio 113,\* in the 9 *Hen. V.* by which it appears that the whole of the King's revenues were declared by the Treasurer and the Chamberlain. It is remarkable, that at that period the Chamberlain seems to have been the higher officer, for in *Rymer* he signs before the Lord Treasurer; but it could not be understood at that time of day that the declaration by them was

\* It is entitled,

“(A. D. 1421.) *Declaratio proficuorum Regni & onerum supportandorum.*”

The declarations follow, and the document proceeds thus :

“*Suprascriptæ declarationes ostensæ fuerunt Domino Regi, per thesaurarium Angliæ, apud Lambhith, sexto die Maii, anno, &c. Nono.*

“*In ipsius Domini Regis præsentia pro tunc constitutæ.*

“ H. CANTUARIE, Archiepiscopo.

“ H. WINTONIENSI.

“ T. DUNOLMENSI, Angliæ Cancellario.

“ P. WIGORNIENSI,

“ Episcopis.

“ H. Domino FITZ HUGH, Camerario Regis.

“ W. KYNWOLMARSH, Angliæ Thesaurario.

“ Magistris J. STAFFORD, Custode Privati

“ Sigilli.

“ W. ALNEWYK, Secretario Regis.

“ Et cæteris.”

conclusive

conclusive as to all those several heads of the King's Revenue, because, with regard to most of them, this Court had then an unquestionable jurisdiction.

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COLERROOKE.

I will venture, in a general way, to suggest what is my idea of the power of this Court, as a Court of Justice, superintending the public business in this department in all its stages. It is perfectly well known (and it would be but pedantry to refer to particular cases) that in ancient times every lord of a manor, who had the appointment of any bailiff as well as the King, had also the appointment of his own Auditors between subject and subject. Now, before the jurisdiction of the Court of Chancery had increased to its present extent, and before actions of a better shape, as adapted to the public business, came into use, actions of account were frequent in the case of an inferior lord, and *à fortiori* in the case of the King. Unquestionably the Crown did, from time to time appoint its own Auditor; but the question is, whether, when the King or a subject Baron appointed his own Auditors, their declaration or judgment on the state of the accounts, was conclusive in any one instance. Undoubtedly it was not conclusive in the case of an inferior Lord or Baron appointing an Auditor. The course was, as we learn from the statute of 13 *Edw. I.* c. 11. when great grievances were complained of by reason of the acts of injustice which were done by those Auditors whom the Lords appointed of their own authority, and when their servants

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were often, on the report of the Auditors, thrown into gaol, and lay there in irons until their balances were paid, and no just discharges they had would be allowed) if the person so committed could find friends that would undertake to bring him before the Barons of the *Exchequer*, he was delivered to them to appear before the Barons, or the Auditors whom they should assign to him, to render his accounts. If the Auditors, so assigned, did not do the accountant justice, he might have a writ *ex parte talis*\* to be returned before the Barons as Supreme Auditors: and Lord Coke says, that by virtue of this writ *ex parte talis*, justice is done to the subject in respect of the reports of these Auditors as in every other case. With respect to the case of subject and subject, therefore the course of justice was this. The Court appointed Auditors, and when these were appointed, the party who was to give in his accounts before them, (and they were judicial characters to a certain degree), was admitted to plead any thing that went to discharge the account, or any particular item which as matter of account was properly pleadable and examinable before them. But in *Comyns*, tit. *Accompt*, (E. 14.) we find that the course of proceeding before these Auditors was, that if there was any real point essential to the purposes of justice — any point of law which was above the scope and understanding of the Auditors appointed by the Court, the party constantly had reference to the Court by whom every

\* Fitz. Nat. Brev. 129.—Writ *ex parte talis*.

such

such matter was set right. So the Crown originally, by a paramount right to any inferior Baron, appointed its own Auditors. Then the question arises, whether the statute of the 33d *Hen. VIII.* c. 39. was not meant to give the subject a remedy, in case the parties so appointed did any acts of injustice, and I cannot but consider that as a remedial act it intended to give remedy to the subject, and that it meant to say, that in every case where injustice is done, or likely to be done, some Court of justice should interpose, in order to correct that, and to receive the plea or points of law or equity which the parties should make, and which the Auditor might not be competent to decide: for it does strike me as being contrary to the principles of justice, that these Auditors, who are ignorant of law, should be understood as actually concluding the Accountant on points of law, save the right the party had to address a petition to the Treasurer and Chancellor of the Exchequer. I think that the result of the examination of the subject is more, that these Auditors may conclude, and be understood to conclude, as to all matters only which properly belong to them as matter of account, and with regard to such questions as are not questions of law or of equity; for it would be totally defeating the purposes which experience of their necessity has pointed out, if this Court were to draw to itself the jurisdiction of these trifling matters, or to interfere in those cases, unless it was where nothing but a Court of justice, as I contend, can give relief. So by a much

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stronger reason, if these accounts have got the length of being carried before the Chancellor of the Exchequer, and Under Treasurer of the Exchequer, and the Lords of the Treasury, it would be absurd to suppose that this Court would draw from their cognizance those matters which peculiarly and more properly belong to them. But many cases may arise in which these gentlemen, notwithstanding their high character and authority, would be equally as incompetent to decide as the persons to whom they are referred in the first instance: therefore it strikes me, that there does remain in this Court that original superintending jurisdiction, which empowers it to assume a controlling power as to directing them on points of law that may arise, which lie out of the province, knowledge, and skill of those persons to whom, in the ordinary course of business, it goes.

Something, however, remains to be said as applying to the course of business at present. I have already stated the argument founded on the absence of precedent, that the revision of this head of accounts never was submitted to the Court till the present occasion. I admit, that there are very few instances, but what has fallen from my Lord Chief Baron and my Brother *Hotham*, satisfactorily accounts for that, and perhaps it will hardly happen again. I do not therefore perceive any of those consequences which are apprehended of a constant resort to this Court. I rather think it would seldom be called

called upon. From the time of *Elizabeth* down to the beginning of King *William's* wars, very little of the public business was done by contract that could introduce or give rise to questions of this sort. The facility with which men made fortunes by imposing upon the public, became at length a notorious grievance. When the Commissioners of public accounts were appointed for the purpose of examining accounts, they found immense and shameful balances in the hands of every public Accountant in the kingdom; balances kept in their hands without paying any interest. Were men of this sort likely to come forward with grievances? Assuredly not; but the very man who gave rise to the first case here, a man whose situation we remember with great regret, at the same time that we feel the justice done to the public interest in his case, affords a striking instance of the benefit to be derived from the exercise of the authority of this Court. The Court in that case acted on the suggestion of a very learned person, who, from a sort of instinctive idea of the powers of this Court, said, if these Auditors will not force the public Accountants to come forward with their accounts, the Court must do it; and an application was made to this Court to accelerate the business of those persons. Now that is a strong instance to shew that the Court have the judicial power and authority to direct the Auditors; and it did do so in that instance with effect. It has been said that it would be monstrous if this Court were to interfere after the account had been investigated. But

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the Court could not interfere before in one instance in a thousand, and they would not take it from persons infinitely more competent to that part of the duty than we can be. Before the constitution of the Commissioners of public accounts, what could the Court have done, when the public business ran to an extent that made it impossible to take the accounts upon the checks of this table? They would have said, the Crown have appointed Auditors, do not come to us to cavil at items, or the discharge of figures:—if you come to us upon some matter of law or equity we must then indeed decide, because no one else can.

I must, before I close, take some notice of the act of Parliament by which we have now, in some instances, express jurisdiction given us. Let me suppose that Auditors constituted by the King—Auditors of the Prest, or those in the time of *Elizabeth*, had at that time of day said to the widow of an officer, we will not hear your discharge, because you do not produce any vouchers—what authority in this kingdom could be resorted to but the *Exchequer*, to know whether that would be a case in which the Court would suffer subsidiary evidence to be given in the absence of vouchers. I take it this Court only had that authority. The Treasurer and Chancellor of the Exchequer had no such authority without the Barons; they are not competent to say what ought to be legal evidence before them. Suppose the Auditors had received the Accountants books to charge him with millions of money, and would not

not receive his vouchers to discharge him, who is to set them right but the Court of *Exchequer*? It is said there is no danger of injustice or injury; but it does behove a Court of Justice to suppose that such cases may exist by which the greatest injustice may be done by Auditors in the first instance, by the arbitrary decisions of those persons, who, without the aid of legal knowledge, are contended to be the ultimate and definitive adjudicators upon cases of legal difficulty,—they often could not do justice, they might do injustice; and therefore the safety of the subject requires, however unlikely it is that injustice should be done, that the opportunity of appeal should be afforded to him.

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COLEBROOKE.

To proceed with the argument drawn from this last act of Parliament, the 25th *Geo. III.* upon which were founded those beneficial public informations, which my Lord Chief Baron and myself have alluded to. The express object and purpose of this statute was to remedy those defects which were found to have existed in the course of taking the public accounts before;—that admits unquestionably that all the accounts, at least of this department, were taken before the Auditors of the Prest. But here let me attend a little to the argument I have just quitted:—how little it could be intended, that these Auditors should be persons who were to have judicial authority, subject to no control whatever, when these officers, at the present moment, I believe, are to perform the office by themselves



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or sufficient deputies, so that those deputies, who are certain clerks, intelligent men in their way, but as little of lawyers as any men, must be supposed to have decided, without control, up to that period, all points of law and equity; and the subject to have no other redress than by petition to the Chancellor and Under Treasurer of the *Exchequer*. This was the case before Auditors of this description took the account. The course of business was, that when these accounts were declared and came into this Court, they were transmitted to the Clerk of the Pipe, and being then put upon the Court roll, process of course issued, if the party did not receive his *quietus*.

The business of the office requiring greater expedition, Commissioners of public accounts were appointed; and it seems to me, that this act, with great deference to the construction that has been given to it, in no respect trenches upon the jurisdiction, nor makes any alteration in it, except where its enactments have done it expressly; and where it was necessary to except out of the operation of the several clauses that power which was intended to be reserved to the *Exchequer*.

The act begins by abolishing the office of Imprest, and leaves all the other officers entire. It then proceeds to authorise his Majesty to appoint by patent those five Commissioners who are now substituted in their place; and these Commissioners

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Commissioners are to appoint officers and clerks, all this having a view to the proper and necessary mode in which these accounts should be taken in the first instance; then the five Commissioners are to be subject to the same control as the Auditors. Now, I protest that I do not know what the word "control" in the eighth section, (unless it means the control of the *Exchequer*, to which the Auditors of the Imprest were subject) can mean. That is a cautious and proper expression to preserve to the Court of *Exchequer* all that superintending power, which it was necessary, for the purposes of justice, that it should retain, leaving the official part of the duty to be conducted by those persons who are more competent to do it. Then it goes on to provide, that the Commissioners shall call before them, (this is the only case in which they have any judicial power, and that is given them by the express words of the statute,) by precept under their hands, all persons who shall have received any money by way of imprest. Before that time the officers of the Prest could not call upon the Accountant to appear personally, for that power was not vested in them by common law; and they could not examine them on oath, or compel the production of books, &c. When they saw occasion, they could call for extracts to be made for them, but no more.

Then comes the clause whereon I venture to suggest the difference of my own opinion from those which have already been given. Section the eleventh enacts, "That they shall allow such  
articles

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articles only as the Accountant shall have been authorised to incur, unless, upon special statement of the matter to the Lord High Treasurer, or Commissioners of the Treasury, the said Commissioners shall be directed to make further or other allowances to the said Accountants accordingly, by warrant under the hand of the said Lord High Treasurer, or the Commissioners of the Treasury, or any three of them." Now, the way in which it seems to me that this clause would receive a construction perfectly consistent with what I have said, leaving the control of the Court of *Exchequer* as it existed from the first over their own Auditors, would be to construe this clause as having relation only to certain known articles of discharge, which persons transacting those contracts abroad, are, by the known constant course of business, authorised to incur, that no other shall be allowed; and that the Lords Commissioners of the Treasury shall be the sole judges of those. But I venture to say, supposing any articles of discharge to depend upon the determination of points of law or matter of equity existing in favor of the party charged, that such are not the articles of discharge to which this clause refers; for it would be a strange thing to say the Lords Commissioners of the Treasury, who never sit as a Court of Justice, should be the persons to decide conclusively, whether this or that contract in writing, and under seal, was to be construed according to the laws of the land, or according to the arbitrary construction which they might put upon it.

Let

Let me suppose, for instance, that the old stores, for which the Commissioners of the Treasury have said that the plaintiffs shall pay 57,000*l.* had turned out to be ruined and gone and devoured by vermin, so as not to be worth any thing; or suppose they had made a gross charge beyond the truth, and that they had done it grossly and outrageously wrong; if it struck every body else so, can it be said that persons, more fit to judge, should not be the proper forum to decide, either by means of a Jury or otherwise, than these persons who have no judicial character or legal knowledge?

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Let me suppose again that this contract was only upon the ground that they should be allowed five pence halfpenny *per ration*, for which they were to find five articles, and that they found that three articles were a losing trade, and that all their profit was to be made upon the two, the salt pork and salt beef; that without that they could make no profit by five pence halfpenny, but be losers by every ration they should deliver out;—if in such a case the commanding officer had said, you shall supply nothing but fresh meat, and we will have that at the proportional price agreed on for the ration, they might then be ruined, if they could not sell the three component parts of the ration on the same terms. That would be a question of construction, as to what, in the first place, do the articles say, as applied to a case of that sort: or if they say nothing, what is then the sense of a Court of law upon

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upon it? Can it be understood that these and much more difficult questions might not come before the Treasury, and are they to sit as a Court of Justice to decide those nice points of law and equity? I apprehend that was not intended. Section 12, says, that the Commissioners may examine all Accountants on oath, and also all other persons whom they may think fit to examine, touching the receipt and expenditure of money. Those powers were necessary to be given them from the defect that existed before. Then it is enacted in section 14, "That when the examinations of each account shall be completed by the said Commissioners, they, or any three of them, shall, and are hereby required to make up a state thereof, and lay the same before the Lord High Treasurer, or the Commissioners of the Treasury, who, after due consideration of all particulars, shall grant their warrant to the said Commissioners to prepare the same for declaration, in the manner and form which has been accustomed."

Then there is another article more peculiarly belonging to these gentlemen to judge of; that no Accountant shall be allowed in his account any sum which he shall issue or pay over to any Sub-Accountants, unless he shall have transmitted to the said Commissioners regular accounts thereof; unless proof shall be produced, to the satisfaction of the Lord High Treasurer, or the Commissioners of the Treasury, that the failure in transmitting them did not arise from wilful neglect. Then the Commissioners are to  
call

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call upon persons to whom money has been issued, to deliver their accounts: this is a clause not unworthy of attention. The Commissioners shall, so often as they shall think fit, call upon such persons to whom sums of money have been or shall be so issued and paid, to render to them an account within a time limited:—that was wanted before—and on failure of the accounts being delivered accordingly within the time so limited, the Commissioners are required to include the names of all such defaulters in their certificates, to be transmitted to the office of his Majesty's Remembrancer, in order that the usual process may issue thereupon; and in case they shall see cause, they are required to give notice thereof to His Majesty's Attorney General in *England*, His Majesty's Advocate in *Scotland*, or His Majesty's Attorney General in any of the colonies or plantations belonging to the Crown of *Great Britain*, as the case may require; in order that such motions may be made by such officer to the Court of *Exchequer*, or other proper Court; and such further or other process may be issued in order to his moving the Court of *Exchequer* in *England* or *Scotland*, or the proper Court in the colonies or plantations, for special process to be issued against such defaulter or defaulters as may be deemed necessary. Now these applications are to be made in all cases of this sort to the Court of *Exchequer* here or in *Scotland*, and these motions to be made for the process, and what is to be done on such process, must, of course, be according to the discretion

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cretion of those Courts. That is, not by virtue of any power given by this act to the Court of *Exchequer* expressly, but they are to do justice in these cases by awarding process by virtue of the constitutional power inherent in them prior to this statute.

By section 23, " No article shall be allowed in the account of any person intrusted with the expenditure of the public money, without a written voucher or other evidence of the actual payment of every sum so claimed to be allowed, notwithstanding any allegation of papers being lost or destroyed, except on application to the Court of *Exchequer*, who shall, and they are thereby authorised and required, on such application, to call before them as well the said Commissioners or some person on their behalf, as the party accounting; and shall cause notice thereof to be sent to the Attorney General, and, after hearing as well the evidence which shall be brought on the part of the Crown by the Attorney General, or the said Commissioners, as that which shall be brought on the part of such Accountant, shall make such order as they shall think fit." Now this is a general direction to the Commissioners of public accounts, in order to hold those persons to a fair and expeditious rendering of those accounts; and they lay down, as an injunction to them, that no discharge shall be allowed without a written voucher. Having made that a general enactment does not take away the jurisdiction which the Court of *Exchequer* had before; but it strikes me, that

that this is to be understood as part of the jurisdiction belonging to the *Exchequer* originally, or the parties would have had no redress when proceeding before the ancient Auditors; whereas, if a complainant had come to this Court, and stated that the Auditors refused to admit any matter of discharge in their accounts, because all their papers had been lost, had perished at sea, could it be doubted that this Court would have interposed?

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These, I think, are the principal provisions of this act. I have already stated what I think is the fair and proper operation of it—that it really was not intended to take from this Court any power it had before. It could only be to shew, that in other respects this Court must be supposed to have the same jurisdiction; for this is the only instance in which the application is directed to be made in case of vouchers: but many other cases might be put. Suppose the Auditors of public accounts were to refuse to receive that which was legal evidence of discharge. Take the case of a man who had the King's pardon. Was he to plead it before this Deputy Auditor? Clearly not. He could only plead that before this Court; for, as Lord Coke says, speaking of the writ *ex parte talis*, those matters of law, of which the Auditor could not judge, were brought before the Court of *Exchequer*. Suppose books were produced to charge a man which were not legal evidence, as if they were made out by his clerk without his privity, and  
items



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items of charge should be founded upon such loose evidence, and they had been admitted — and the question was, whether they were properly admitted. What could the auditors have done? I will not waste time in putting a great variety of cases of points of law that might arise, and which the Auditors and the Lords Commissioners of the Treasury are not competent to decide.

These are, in general, the grounds upon which I felt myself compelled to form my opinion, that this Court has never been deprived of that judicial character which originally belonged to it, and which is derived from the earliest documents in the Court, — the cognizance of taking accounts for the charge and discharge of the subject. With regard to the mode in which that may or can be, with propriety, done, from the dearth of precedents, I can hardly venture to speak; — but it seems to me that it might be practicable, from ancient precedents, to point out a mode in which the Court might act. If there is any doubt whether the party has had a fair measure of equity dealt out to him upon the present occasion, I see no sort of objection to the Court staying its process, and not suffering judgment to be entered upon the record till the party had an opportunity to plead, — or, as it does in cases of Statute Staple, issue a *scire facias*, in order that the party may be let in to plead. If that should fail, they may do it, as in *Sir Thomas Cecil's case*, on a bill to be filed by the petitioner, to which the Attorney General might be made a party:

or

or in the form of an issue, upon the particular circumstances of the case, in which not only the Treasurer and Chancellor would be assisted by the Barons; but the Barons also might have the benefit of their concurrent jurisdiction, for, from the history of this Court, the Treasurer and the Chancellor of the Exchequer, as it appears to me, ought in such a case to have their due weight. I apprehend, therefore, that it might be done with perfect propriety in some such mode,—and I, for one, cannot see any great difficulty or danger that would be likely to ensue.

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My Lord Chief Baron and my Brothers say, they never heard of any issue being directed out of this Court.—Nor have I; but if the introduction of this new regulation, by holding public accountants with a tighter rein has drawn their attention to this Court, as to a Court of redress from actual or possible injustice, and the question is fairly brought before the Court, I cannot see that it is any objection to the exercise of the jurisdiction that there happens to be no particular precedent, to ground that which is in them an act of justice. If we should think, when the question came properly before us, that we were authorized to pronounce the party entitled to a remedy, I conceive, humbly when opposed by such authority, that it might be made the subject of an issue; because there is no question on which a Jury of *English* merchants would be more conversant or more competent to decide. And as to any legal question, I think the Court would be most fit to decide it, upon a view of the contract.

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COLEBROOKE.

With respect to the vast influx of business this would throw upon the Court, there is not much to be feared from that. I think it would be found that this Court has in itself sufficient power to make such a sort of traffic, and the resort to it not a very gainful speculation to those who should adopt it.

With regard to this Court taking upon themselves the practical examination of the accounts, I deprecate it. We have no longer any cheek upon the accounts as to mere matter of figures and allowances; this Court, the instant they heard it, would say, we cannot appoint you better Auditors than the Crown has given you;—but when you come to matter clearly out of their knowledge, and out of their power to attain a full and complete mastery of, it strikes me as different. It is not likely to be a subject which will often present itself in this Court, because acts of injustice are as little likely to happen here as in any Court upon Earth; but if such should occur, God forbid there should not be another forum, for the ultimate decision, than an application to characters of this sort, however high they may stand in point of rank and integrity.

As far as respects the shape in which the present application is now brought on, I have considerable doubt. The ends and purposes of justice seem to require that we should hold in our hands the power I have been contending for, and I will not depart from it, till I am driven from it by precedent, or a positive, clear,  
and

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and distinct clause of an act of Parliament. The circumstance of there being no appeal, however, I think, precludes the possibility of our going into a question of so great a magnitude and extent upon a summary application; though I still think some attention due to the subject, to see whether it is not that sort of case which has so much of reason or of law or equity in it, as to induce the Court, before it decides it definitively, to send it to some further mode of enquiry; and if the Court had been of the same opinion with me, it might have been a hint, perhaps, to those persons before whom it originally came, to prevent any further litigation upon the subject, by a re-examination of these articles, and a mitigation of the charge. When I say that, I speak with unfeigned deference to those who have examined these accounts. They are extremely competent to the subject, and more likely to be in the right than myself: yet according to the view I have of this case, I incline to think, particularly with regard to the manner of construing a contract, allowing only by rations, that some injustice has been done; but it is, perhaps, for the benefit of the country, that I should be overborne by the much higher authority of my Lord Chief Baron and my Brothers, and I therefore acquiesce.

HOTHAM, *Baron*. \* In delivering my opinion upon the present motion, I certainly need not

\* In point of order, this, and the short judgment delivered by Mr. Baron *Thomson*, should precede Mr. Baron *Graham's*, but they have been postponed for the reason given in the note prefixed to it in page 88.

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do more than say that I acquiesce entirely in my Lord Chief Baron's opinion, after the very elaborate opinion which he has been so good as to deliver. The bench, the bar, and the public, must feel themselves extremely obliged to him for the very laborious investigation which he has bestowed upon the question. I shall, however, (as there is unfortunately a difference in the Court upon the question) state very shortly my reasons for concurring with my Lord Chief Baron; but I do not think it necessary to enter much into that part of the question which respects the jurisdiction of the Court, because it is impossible for me to add any thing to what my Lord Chief Baron has stated upon that part of the case.—I think that the principal point for our more immediate consideration is, whether, even admitting the jurisdiction of the Court up to the full extent that is contended for, it is proper for us, in our discretion, to exercise it on the present occasion; for it is not argued or contended:—it is not even suggested, that at all events and under any circumstances we are bound so to do. If the point should ever be brought before the Court by plea to a bill or information, it will then be the time to enter into and to decide the question. We shall then be driven so to do; but though my present inclination is most strongly against the jurisdiction, for the very convincing reasons which my Lord Chief Baron has stated, yet, when the necessity of deciding it shall arise, I shall then think myself, for the first time, bound to deliver a decided opinion on that part of the case; it is enough for me therefore to

say

say at present, that circumstanced as this case is, and complex and difficult as it appears to be, we ought not, in my opinion, to entertain it summarily on motion.

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On the point of jurisdiction, however, I will say a very few words. We cannot but observe, that it seems clear there always was a fundamental distinction between the auditors of the Exchequer and the auditors of the Prest; those very distinct officers being sometimes confounded, has given rise to difficulties and doubts which in their constitution did not really exist. The Auditors of the Exchequer, or those Auditors who were attendant upon the Court, were always under its direction, the Barons being, as Lord *Coke* says, the sovereign Auditors of *England*. But the Auditors of the Prest were under the immediate and exclusive direction of the Chancellor and Treasurer. Mr. *Madox* gives several instances in his second volume, (ch. 24. s. 7.) of Auditors being appointed *ad libitum*, and for particular purposes, by which it is most manifest, that they could not have been considered as known constant stationary officers of the Court. Certain clerks were appointed to audit the foreign accounts, and they seem to have been regular settled officers. But antecedently to their existence in preceding times, the accounts of some part of the revenue were usually audited, as he observes, by some of the Justices or Barons, or by clerks or persons assigned *hac vice* for that purpose by the King, or by the Treasurer and Barons, or by the King's Council at the Exchequer. So that, although sometimes the Barons

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themselves, or some or one of them examined the accounts, the superintendence of that duty does not seem to have made a part of the original or necessary business inherent in the constitution of the Court; if it had, that duty must have fallen on some known officers of the Court, and the Auditors would not have consisted of such a variety of persons, or have been named sometimes by the King, sometimes by the Treasurer and Barons, and sometimes by the King's Council.

It appears also, from many instances mentioned by *Madox*, that on the occurrence of any very extraordinary accounts, they were taken, and could only be taken, by Commissioners under special commissions: so that there certainly was a time when the taking of accounts made no part of the settled inherent jurisdiction of the Court vested in the Barons; and the uniform conduct of the Accountants is, in my mind, a very strong argument against the Court's having this peculiar jurisdiction; for, if it vested in them, would they not, indeed must they not, have compelled every Accountant to report his accounts to them. On the contrary, they have never interfered with them, but they have been invariably settled by the Treasury, from the time of Queen *Elizabeth* down to the late parliamentary appointment of Commissioners for auditing the public accounts, the same form of words has uniformly run through all the appointments of Auditors, namely, that the office was granted to them to audit,

audit, &c. by and with the authority and consent of the Treasurer and Chancellor\*. This Court therefore never seems, as to them, to have been considered as the immediate superintending power, and one can hardly suppose—what one necessarily must, to support the other side of the argument—that every one of those patents, from the 39th of *Elizabeth* to the year 1785, has been illegal, and a direct invasion of the ancient constitution of the Court of *Exchequer*. Such an interference of the Court as is now prayed for, would therefore necessarily go the length of overturning all the proceedings in the Auditors' office from the time of Queen *Elizabeth*. A measure which might, eventually, be followed by such a consequence, is therefore not to be adopted hastily, but requires a much more solemn consideration than can be given to it in this summary mode of proceeding.

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These are some of the doubts which I entertain on the subject of the jurisdiction itself. But be that point as it may, and supposing the jurisdiction, even after what my Lord Chief Baron has so fully and ably stated, to be with the Court, supposing it clear and indisputable, I am prepared to say, that on such a motion as the present, resting altogether on our discretion, whether we ought to grant it or not, my opinion is decidedly in the negative.

\* See the form of their appointment in a note to the following case of *Colebrooke v. The Attorney-General*, post, page 100.



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In the first place, we are not now on a case of money appearing by the records of the Court to be charged on an Accountant, where there can be no doubt of our jurisdiction; but we are in the singular situation of having no record nor judicial proceeding whatever brought before us. We have no instrument or document of any kind with which the Court have any thing to do, judicially, and we are called upon, as a Court, without vouchers, or any means of judging, to pronounce on the construction of the terms of a contract made above forty years ago; and that construction depending on many circumstances which might have been and probably were well understood by all the parties at the time of its being made, but which, after so many years have elapsed, must require much more explanation than we can now be furnished with. We are desired to come to a judicial determination which shall control the judgment of Commissioners, acting under the sanction of their oaths, and appointed by act of Parliament, in the stead of the ancient Auditors, for the very purpose of expediting the public accounts—of correcting mistakes and abuses in them—of doing justice to individuals on the one hand, and of protecting the interests of the public on the other. And we are pressed to do this in a mode, namely, on motion, which precludes all possibility of appeal from our judgment.

It cannot but be recollected, that during the last century, if the wars in which this country has

has been involved have not been more frequent than heretofore, yet at least they have been infinitely more various and extensive, our fleets and armies have been much more numerous—contracts, of course, for their subsistence much larger, and a spirit of enterprize in carrying war into various and distant parts of the world, called much more into action than when it was confined to narrower limits, within which its operations were usually circumscribed in former times, and yet all contracts, multiplied and enlarged as they have been, have hitherto always rested between the Treasury and the Accountant, without the interposition of this Court, excepting in the few instances which have been stated by my Lord Chief Baron; and it is observable, that in the case of *Mr. Durand*, nothing in the end was done upon it. The claims made by contractors, when their accounts were to be settled, we may at least say, have not always been thought by the Auditors, nor since by the Commissioners, so perfectly satisfactory and unquestionable, as not to call, in many instances, for examination and correction. Such investigations have not unfrequently turned out disadvantageously to the individual; and, according to the decision of the Auditors or Commissioners, the contract in question has sometimes proved either a mine or ruin to the contractor; and yet, where so many interests—where the fame, the fortune, the expectations, and resentments of the Accountants, must have so frequently and so strongly urged them

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them to disengage themselves from a tribunal which so often spoke death to all their hopes; not an instance is to be found, for two hundred and fifty years, of the investigation of such a question being transferred from the Auditors to this Court, by which the contractor might at least have taken the chance of a more favourable determination. I state this always with the exceptions that have been mentioned by my Lord Chief Baron.

Can it be possible, then, that such innumerable instances of unqualified submission to the authority of the Auditors, would have been made by men injured beyond reparation in their own conception, if they, or any of their advisers, had thought the point was even disputable? But let it not be forgotten, that what has been done by the Court in one case cannot be conclusive on any other; all cases must stand or fall on their own merits, they must be decided on the peculiar circumstances affecting each; and though such an interposition may be perfectly proper in one case, it may not only be unnecessary, but inconvenient and unjust in another. The fact of this Court having been so very rarely appealed to for so many years, under circumstances so obvious to sanguine and disappointed men, is surely a strong ground for doubting, at least, very much the jurisdiction, but, at all events, for refusing so novel an application, the effect of which would be, to throw all transactions of this nature between the Treasury and private individuals

individuals into endless delay, confusion, and expence.

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But is it quite clear, if this Court were to take the case out of the hands of the Commissioners and of the Treasury, what process is to be issued, and against whom? This is a difficulty that requires some consideration; suppose the Treasury, who, it seems to be allowed, have, upon this subject, a concurrent jurisdiction at least with this Court, were, after we have possessed ourselves of it, to proceed to determine upon it themselves. Is it quite clear that we have the power of enjoining them? If we have not, then, suppose the Board of Treasury and this Court both proceeding upon it, but drawing different conclusions from the same premises should pronounce opposite judgments.—What is then to be done? Clashing jurisdictions cannot exist together. These are some of the difficulties that may arise from our interference in this summary manner, and it is very remarkable, that the statute (25 *Geo. III.* c. 52. s. 11), mentioned by my Lord Chief Baron, directing the auditing and examining of the public accounts, enacts expressly, that the Commissioners shall allow such articles of discharge only as the said Accountant shall have been authorised to incur; unless upon a special statement of the matter,—To whom?—to the Lord High Treasurer or Commissioners of the Treasury, the said Commissioners of public accounts shall be directed to make further or other allowances to the said Accountants accordingly,  
by

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by warrant under the hand of the said Lord High Treasurer, or of the Commissioners of the Treasury. Not a word is here said of any application to or interference of the Court of *Exchequer*; and the Legislature could hardly have overlooked it in this instance, when, in the 23d clause of the same chapter, it directs, in the event of written vouchers being lost, that an application shall be made to this Court expressly, and not to the Treasury. The fair inference to be drawn therefore, from this Court being mentioned in one clause, and omitted in the other, is, that it was the intention of the Legislature to give the jurisdiction to this Court in the one case, but to exclude it in the other.

Before we enter then on so untrodden a path, and overturn, as I before said we must, the course of proceeding in the Auditors Office from the time of Queen *Elizabeth*, we should consider well the probable consequences that would ensue. In the first place, we should involve this Court in so much business of a most voluminous nature, and attended with much nicety and intricacy of figures and calculations, as would of itself employ every moment of our time. But in that I beg not to be misunderstood. I do not mean to say, that whatever the weight of business may be, we, as the Judges of the Court, are not bound to give our time and our best abilities to the discharge of it; it is our duty so to do, and we must get through it as well as we can; the public have a right to exact from us our utmost services,

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services, and which, I will only add, those who have gone through the office we hold know to be sufficiently laborious. But have the rest of the people of *England* no right to some portion of our time? Is the Court of *Exchequer* to be open to no other business and no other suitors? For I will venture to say, that if every dissatisfied Accountant should find his way into this Court, after a dispassionate investigation of the Commissioners shall have been exercised in his particular case, it would be folly for us to attempt to attend to any other business. This is another cogent reason for not plunging ourselves hastily and officiously into the investigation of such voluminous and intricate accounts; and for our not entering into the minutiae of detail, which every Court of Law and Equity have found themselves indispensably obliged, for the necessary dispatch of business, to delegate to special officers particularly appointed for the very purpose of getting through those details, which, as a Court, it would be impossible for us to do.

But if we are in every instance to correct the error of the Commissioners, if they shall commit any; *ex vi termini*, it must be our duty not only to tell them wherein they have erred, but to point out to them also what they ought to have done. Are we now prepared so to do? I profess that I cannot say in a summary manner what would have been a good or a bad bargain for the public, and a fair one for this contractor, forty years ago. Nor can I say what ought to have

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*Ex parte*  
COLEBROOKE.

have been the true construction of the contract at the time, under circumstances totally unknown to us, and which, at this distant period, cannot be unravelled or explained to us. Can we know the different prices of the various commodities at the respective markets where it might have been necessary or adviseable, or practicable to have purchased at the particular time, and under the then existing circumstances of the war; or are we now to ascertain the amount or difference of freights from the different ports in *Europe*, at which the articles then actually were, or might, or ought to have been shipped, without having any reference to the certain or probable places of destination in *America*, all depending on doubtful events and the chances of war? I state these as some of the many circumstances which must be taken into consideration before any man has a right to pronounce on a contract made so long ago: and to shew the absolute impossibility of this Court entering on such an enquiry.

But it was said, that to avoid all difficulties, we might direct an issue. Is that a serious proposition? Could a Jury ever get to the end of so complex an enquiry? The thing is impossible. But another short answer is, that from the beginning of time to the present day, no such issue ever was directed. The present application then, being pregnant with difficulty, and loaded with inconvenience, I am of opinion, that it is too novel and dangerous to be granted; and

and though the Court has, in some instances, as I before stated, Mr. *Rigby's* for example, a few years ago, interposed for the purpose of calling on the Auditors to proceed in what was their duty and particular province, namely, to prepare the accounts for declaration; yet to transfer such their peculiar office to the Court itself is a very different consideration. Such cases, therefore, however properly decided, can never guide in one like this. The Lords of the Treasury are the known, tried, and proper persons for making such contracts as this, and afterwards the Commissioners, for winding them up and settling the account with justice to the individuals and to the public; and I will add, that till the Judges of this Court shall become, what it is to be hoped they never will, political characters in this country, they must be peculiarly unfit to interfere in a sort of business that may so frequently, and sometimes perhaps unavoidably must turn on political hinges.

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*Ex parte*  
 COLKBROOK.

The Legislature has in its wisdom constituted certain persons armed with large and important powers, to be exercised under the sanction of their oaths for the execution of this duty; the judgment of these officers, so constituted, ought not, in my opinion, to be drawn into question without strong grounds for imputation; and I confess that I do not see my way sufficiently clear to pronounce summarily, that in the present instance they deserve any, without a great deal more evidence than that which we have before



1819. before us. The Board of Treasury is always open  
1803. to any application which public Accountants,  
*Ex parte* who think themselves aggrieved, are entitled to  
COLEBROOKE. make to them: to that Board they may and  
ought to resort, and it is not permitted to them  
to take it for granted, as was hinted at in the  
argument, that on such an application justice  
would not be done to them. I am therefore  
decidedly of opinion against receiving the pre-  
sent motion.

THOMSON, *Baron*.—After the very full and  
able discussion which this subject has received  
both from my Lord Chief Baron and my Brother  
*Hotham*, I shall content myself merely with de-  
claring my opinion, that the Court ought not to  
comply with this application which has been  
made to it, to interpose with directions to the  
Commissioners of public accounts, respecting the  
articles of the account now depending before  
us, and attempted to be brought in question; and  
therefore that this order ought to be discharged.

Order discharged.

*THE following case having established, after full argument, on principle and precedent (notwithstanding the more than doubtful obiter opinion of the majority of the Court on the preceding motion) the jurisdiction of the Barons, sitting as the Court of Exchequer, over the Commissioners for auditing the Public Accounts, and what is scarcely less important, the proper mode of obtaining redress to be adopted by the subject seeking relief in such a case; and that it may be pursued in the first instance, although the Accountant have not been, in fact, sued or impleaded,—the Reporter has, with considerable difficulty, procured authentic materials for furnishing a correct report of both the cases: and having surmounted the labour of reducing the substance of the very voluminous transcripts of the short-hand writers employed in taking the arguments and judgments, and carefully collating the subject-matter, with the original briefs and the notes of the Gentlemen engaged professionally in arguing the question, some of whom have kindly taken the trouble to revise the whole,—he now feels himself fully sanctioned in venturing to commit to the press these decisions of the Court, establishing points of such vital importance; although he had not the advantage and security of personally hearing them pronounced: and he hopes, that by their publication, he is rendering an essential service to the Profession and the Public.*

*4.2p. Ca. 575.*

*The obvious causes of the great length of these cases are the abstruse subject-matter and novelty of the doctrine, the remote sources of the reasoning furnished by the unusual labour and research of the Bar engaged on either side, (and on the former occasion, of the Bench also) the variety of the arguments adduced, and the number of precedents cited from the archives of the Court; but that inconvenience has been deemed not worth consideration where so much valuable information is supplied by the arguments and consequences so momentous result from the decision.*

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b 69387

Saturday,  
28th Feb.

1807.

20th, 22d, 23d  
November.

1805.

28th January.

1803.

Jurisdiction.

Sir GEORGE COLEBROOKE, Bart. and others v.  
The ATTORNEY-GENERAL and others.

Demurrer.

The Commis-  
sioners for audit-  
ing the public  
accounts, as  
appointed under  
the 25th of

*Geo.* the 3d. ch. 52, are amenable to the jurisdiction of the Court of *Exchequer*, and subject to their controul; that statute, in forming them into a Board for the performance of the duty of that branch of the original business of the Court, being held not to have constituted them an independent judicial body, nor to have destroyed or transferred the original authority of the Barons of the *Exchequer* sitting as a Court of Judicature over all matters of revenue accounts.—The Court of *Exchequer* has still the same controuling power, in its judicial capacity, over the Commissioners for auditing the public accounts, as it previously had over the former Auditors of the Prest.

#### Public Accounts.

*Semble*, Public Accountants, therefore, who may have reason to be dissatisfied with the determination of the Board, in disallowing their articles of discharge or imposing surcharges on them, have a right to the interposition of the Court of *Exchequer* in their behalf, on a suit instituted for that purpose: and the Court will relieve the complainants on a case of equity being made out by them, by referring the accounts back to the Commissioners to review their allowances, &c. or they will, as they were formerly wont in the case of the Auditors of the Prest, direct them to make such special allowances to the Accountant as shall seem to the Court to be just, and to prepare the same accordingly for final declaration.

*Quere* whether the declaration of accounts by the Commissioners for auditing the public accounts and the Treasury, be final, and concludes the Court of *Exchequer*.  
*Semble*, not.

#### Practice.

An Accountant seeking relief in this Court from the determination of the Board, should proceed *by bill* to be filed against the Attorney-General. The Court will not interfere on motion upon a petition. *Vide Ex parte Colebrooke*, ante, page 87.

Demurrer to such a bill over-ruled.

#### Construction of Statutes.

The statute of 25 *Geo.* 3d. ch. 52, has not given to the Lords Commissioners for executing the office of Lord High Treasurer, any judicial authority over the Commissioners for auditing the public accounts, in exclusion or derogation of the paramount jurisdiction of the Barons of the *Exchequer*.

The statutes providing for the relief of subject Accountants, who have equities against the Crown, held not to be confined to cases where the subject be actually sued or impleaded, but he may proceed by bill in equity in the first instance, and as it were *quis timet*, and that during the passing of his accounts before the Commissioners.

Sir *George Colebrooke*, on the same grounds, claiming, as before, to be entitled to certain allowances in their accounts, which the Commissioners had refused to make to them, and also to be relieved from surcharges.

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1807.

COLEBROOKE  
and others  
v.  
ATTORNEY-  
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The short substance of the matters stated in the bill is, that the plaintiff, Sir *George Colebrooke*, together with certain persons whose representatives the other plaintiffs were, had entered into contracts (in 1759 and 1761) with the Lords Commissioners of the Treasury, for victualling the *British* troops in *North America*; — that they had from time to time supplied provisions accordingly to the amount of 384,347*l.* 17*s.* 7½*d.*; — that after the expiration of the contracts (in 1766), the contractors delivered in their accounts, stating a balance to be due to them of 47,600*l.* at the office of one of the Auditors of the Imprest\*, for the purpose of getting them passed; — that not having been done, and the accounts remaining still uninvestigated, they were, in 1786, laid before the Commissioners for auditing the public accounts (then newly appointed under the recent act of Parliament), for the same purpose, in pursuance of their precept.

The bill then stated, that the Commissioners had, upon the investigation of the accounts, charged the Accountants (as they alleged unjustly)

\* Commissioners for auditing the public accounts were not at that time appointed.

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with a sum of 57,725*l.* 16*s.* 5½*d.* as the value of provisions remaining on hand in the stores of the preceding contractors, *Kilby and Baker*, and delivered over to the Accountants;—and that the Commissioners had also surcharged them (unjustly), with a sum of 40,432*l.* 19*s.* 7½*d.* as an over-charge in value on the provisions furnished by the contractors, according to the price contracted to be paid.

The plaintiffs, therefore, prayed that the defendants might *answer* the premises;—and that the plaintiffs might be declared to be entitled to, and to be allowed the sum so surcharged:—and that *the Commissioners for auditing the public accounts, might be directed, by the order of this Court, not to charge the plaintiffs with the sum of 57,725*l.* 16*s.* 5½*d.* in the statement of their account.*

To that bill the Attorney-General put in a general demurrer, for that it contained not any matter in equity whereon the Court could ground any decree, or give the complainants any relief against *him*.

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*The Attorney-General (Perceval), Leycester, and Mitford*, now appeared, to support that demurrer.

They admitted, that (if the Court had jurisdiction in the present case, and if the complainants had pursued a proper course in adopted this proceeding

proceeding by bill against the Attorney-General) the statements in the bill were such as the Court would probably consider ought to be answered. They professed, therefore, that the principal object of the demurrer was to bring before the Court the question of its having jurisdiction to exercise a judicial authority over the Commissioners, in the matter on which the bill was founded. That question would be, in substance and effect, whether, in a case where the accounts of a public Accountant have undergone a course of investigation in the regular manner, before the Commissioners for auditing the public accounts, and a statement of those accounts has been accordingly prepared by them, for the purpose of being submitted to the Lords Commissioners of the Treasury for final declaration — the Barons of this Court have power to interfere on the behalf of the Accountant (complaining, by bill, against the Attorney-General), and by their order to require the Commissioners to make allowances, which they had in the exercise of their authority under statute (25th *Geo.* III. ch. 52.) refused to sanction, or to strike off surcharges which they had thought proper to impose. Another question, they stated, would arise on the nature of the proceeding, which would be, whether, if the Court possessed any such jurisdiction, an Accountant considering himself aggrieved, might, before any suit should be instituted against him, apply to this Court for redress, by means of a bill, to be filed against the Attorney-General, founded on an alleged claim against the Crown.

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On those points, they insisted,

First, that the Court had no such jurisdiction ; and they submitted, that the present demurrer was founded on as plain and obvious a principle as if it had been put in to a bill filed in this Court by the failing party, in an ordinary action at law, complaining that the jury before whom it had been tried in a Court of competent jurisdiction, had not done him justice by their verdict ; for, they contended, the Board of Commissioners were now the proper and only constitutional tribunal for the investigation of public accounts, established by the authority of Parliament, and that their determination, when it has received the confirmation of the Treasury, is final and conclusive ; and they submitted, that if in the present instance the party complaining had been, in fact, aggrieved and wronged by the determination of the Board, his only immediate source of appeal was to the Treasury : or that as his ultimate resource, he might make application to the Crown by the only mode known to the Constitution, the subject's *petition of right*.

They stated, that the chief propositions on which they meant to rely, and which their arguments would be offered to support, were — that the Commissioners for auditing the public accounts as at present constituted under the 25th of *Geo. III.* ch. 52, are not subject to the controul of this Court as to the exercise of their judgment and discretion in performance of their duty of auditing

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ing the public accounts; for that whatever jurisdiction in matters of public accounts the Court might have had before, it was, since that statute, incompetent to the Court so to interfere with the official conduct of the Commissioners as to make any order on them, directing them to sanction any charges which they may have previously refused to allow, or to withdraw any surcharges which they may have judged proper to impose on the Accountants;—that the act of Parliament by which the Board of Audit was created, in order that they might supply more efficiently the place of the former Auditors of the Imprest, had given them full power to take the accounts of public Accountants, and had subjected them to no other controul or superintendence than that of the Treasury; the eleventh section having expressly enjoined them to make no allowances but such as they shall be directed to make by the Treasury, to whose declaration and determination the act finally refers the audited accounts, thus constituting the Board of Auditors, and the Lords Commissioners of the Treasury exclusively and conclusively, a sole and entire Court for the investigation and passing of the public accounts; so that wherever they shall not have made to the Accountant sufficient allowances in their audit, the Commissioners were expressly subjected, by the terms of the statute, (section 11) to the further order of the Lord High Treasurer or Commissioners of the Treasury, to whom alone the ultimate power of redress had been exclusively given: and to them only, on

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all such occasions, was the Accountant, in every case of supposed injustice, directed to apply, and that, upon special statement of the matter of complaint. In fine, that subject only to such controul, the Commissioners for auditing the public accounts now formed a judicial forum, with full authority, in the words of the statute, to "*try* and examine the several accounts and vouchers which shall be transmitted to them from time, with *as little delay* as possible," (section 10), and that therefore, excepting the Treasury, they were not responsible to, or controulable by any other authority whatever; for that from the general tenor and purview of the statute, it was to be collected, that their decision was to be final: and therefore if the Court of *Exchequer* ever had any jurisdiction or authority over the Auditors of the Prest, the statute of the 35 *Geo. III.* had virtually taken it away as fully as if it had expressly and in terms so provided.

They denied, however, that the Barons of the *Exchequer* ever had any judicial power over the Auditors of the Prest, independently of the Treasurer, and if they had, they asserted, that by the 25 *Geo. III.* that controul was, if not in words, in effect and by operation of the provisions of the act, abolished with respect to the Commissioners appointed, and to be appointed, under it.

By that statute, they observed, the present Commissioners for auditing the public accounts were,  
 in

in terms, expressly substituted in the place of the Auditors of the Imprest (section 1), and were invested with all the powers and authorities (section 8) of those Auditors in the exercise of their duty, and were declared to be subject to such control only as they were subject to, and to no other: and they noticed that the act gives the Commissioners many other and higher powers (such as examining Accountants on oath (section 12), and others) than those Auditors formerly had, so that they were placed on a very superior footing, and by a higher authority. The statute, however, having referred to the office of Auditor of the Imprest in describing and fixing the duties and powers of the Commissioners, rendered it material to the investigation, that the actual character, functions, and authorities of those officers, and the control to which they had at any time been subject, should be enquired into and ascertained. As the summary, therefore, of what they had been enabled to collect respecting them in the course of their researches on the subject, they observed, that they appeared to have been first appointed and endowed with the high authority and powers which they afterwards exercised, in the second year of the reign of Queen *Elizabeth*, superseding the then existing office of the Auditors of the *Exchequer*; and that they had continued from that time till the 25 *Geo. III.* to act with very great latitude of discretion in the judicial functions of examining and passing the accounts of public Accountants, and adjudicating on the allowance and disallowance of every article  
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of discharge submitted to them by the Accountant; — that their determination was afterwards in the regular course laid before the Treasurer and Chancellor of the Exchequer, for their final declaration, with which the Barons (unless where one or more of them may have been required to assist the Treasurer), have never had any thing to do, nor have they ever taken on themselves to interfere, and that accordingly there are no instances to be adduced, wherein the Barons have in any respect assumed jurisdiction over the conduct of the Auditors of the Imprest, which may not, when explained, be distinguished from such an interference as would afford ground for establishing that they had any authority so to interfere in their judicial capacity as a superior Court, to whose control the Board was subject. From the absence of instances, therefore, wherein the Court had ever exercised a controlling power and jurisdiction over the Auditors of the Imprest, they urged that there could never have been any inherent authority in the Barons, under which they might have superintended the conduct of the Auditors of the Imprest, or redressed complaints of their acts; and if not, *à fortiori*, they could not have any such jurisdiction over the Commissioners for auditing the public accounts, constituted by the high authority of an act of Parliament rendering them an independent judicial body.

They acknowledged that a necessary conclusion to be deduced from these propositions would be,

be, that the Board of Commissioners must be considered a judicial Court, from which there was no appeal but to the Treasury, beyond which there could be no further appeal: and they anticipated that it would be objected that such a Court would be an anomaly; but they insisted, that it was, nevertheless, fully competent to the Legislature to create such a tribunal; and the only question would then be, whether the Audit Act had not, in effect, virtually so constituted the Commissioners for auditing the public accounts, referring the Accountant solely to the Lord High Treasurer or the Commissioners for executing that office, as the last resort. Thus, they submitted, the Legislature had, itself, as if anticipating such an objection, supplied the defect by furnishing a substitute, and accordingly the Accountant is given the opportunity of appealing to the very high and competent authority of the Lords Commissioners, and of being heard before them by Counsel, when, after due consideration of all the particulars, they are directed to grant their warrant to the Commissioners to prepare the accounts for declaration as before accustomed, and that declaration of the accounts is final and conclusive in the nature of a record\*.

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With a view to shew that the statute had so constituted the Board of Audit as the immediate Court, and the Treasury as the Court of appeal

\* Vide pages 112 and 113 of Mr. Baron *Graham's* judgment in *Ex parte Colebrooke*, ante.

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from their determination; they entered into a minute and critical investigation of the several sections of the act of Parliament, and contended, that as efficacy and promptitude in the performance of their duties by the Commissioners, had been the chief objects of the statute, which was apparent from all parts of it, it had created the Board of Audit a competent judicial body, for the full *adjudication*, in the first instance, of all matters in difference between the public and the Accountant, subject always to the control of the Commissioners for executing the office of Lord High Treasurer, and to them only; and finally, amongst others, as a strong and particular instance of the extent of authority given to the Commissioners by the Legislature, they adverted to the provisions in section 19, where the act (after directing the names of defaulters in delivering their accounts to be transmitted to the office of his Majesty's Remembrancer, that the usual process may issue), has required, that if the Accountant can state any *special* reason for justifying a delay of the process, that statement is to be made, even on so important a judicial occasion, not to the Court of *Exchequer*, but to the Treasury. They urged further, that not only had the statute thus expressly invested the Lords Commissioners of the Treasury with the entire and ultimate control over the Commissioners for auditing the public accounts; but by having mentioned the only instances wherein the Court of *Exchequer* was thereby authorised to interfere, it had, on the well known principle of construction, virtually excluded

excluded this Court from all authority or jurisdiction which it might before have had in every other case. The only occasions on which the act had authorized and *empowered*—a word importing an original and first delegation of such an authority—the Court of *Exchequer* to act, they observed, were in cases of fines being set on Sub-accountants (the Court of *Exchequer* being then authorised to set and impose such fines as on application to them for that purpose, they shall think fit, section 20)—and where the Accountant may have lost necessary vouchers, in which case, also, the Court of *Exchequer*, on application, are authorised and required to call before them the Commissioners and the party accounting, and after notice to the Attorney-General, and on hearing the evidence on all sides, they are to make such order as they may think fit, (section 23). As an authority on that point, they cited the argument of Lord *Somers* in the *Banker's case* (a), who labours much to shew that the jurisdiction of this Court was anciently considered to be very much restrained even in what was “immediately their business, viz. matters of account depending before them, in which they could make very few allowances, however just and reasonable in themselves, without a particular authority under the great or privy Seal,” (p. 147 a.)—and they observed, that the whole of Lord *Somers's* very elaborate argument in that case, goes to establish that this Court has

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(a) State Trials, vol. xi. p. 147.

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no such power as the plaintiffs attribute to it, but that the Treasurer, as the highest authority in the Court, alone has that power, and that the Barons are subordinate and ancillary to him (p. 151) in all matters regarding the passing and allowing of the public accounts, for which his Lordship cites the *Mirror*, cap. 1. sec. 14, where it is said that "the business of the *Exchequer* (the Barons) is only for the King's profit, and to hear and determine torts done to the King and his Crown in right of his fiefs and franchises, and the accounts of bailiffs, &c. by the view of a *Sovereign* who is the *Treasurer of England*."

That this Court, when composed of the *Treasurer* and Barons, had a superintending authority in certain respects over the Commissioners for auditing the public accounts, analogous with that of the Court of *King's Bench*, over magistrates and others whose authority emanates from that Court, they did not deny; or that the Court might order them to proceed in the exercise of their functions, if they wholly neglected their duty; but they submitted that they could not (nor could the Court of *King's Bench* in the instance put) prescribe to them in what manner their duties should be performed, the utmost which they could do being to order them to review their determinations, not that they should alter them in particular respects; for that the Commissioners were, for the purpose of their duties, like magistrates &c. invested with a judicial character, and were not merely ministerial officers.

They

They then traced, in elucidation of these arguments, the statutory history of the appointment of Auditors of the Revenue, beginning with the act of the 27 *Hen. VIII.* ch. 27, establishing the Court of Augmentation, with Auditors, and which was confirmed by the 7 *Edw. VI.* ch. 2. till, by the 1 *Mary*, sess. 2. c. 10, that Court was dissolved, though afterwards ineffectually attempted to be annexed to the Court of *Exchequer* by letters patent, to which was appended a schedule of articles for their regulation and guidance. The appointment of Auditors of the Prest having been first established by charter in the 2d *Eliz.* with full power and authority for the determination of all accounts of persons to whom money had been imprested, with reference to the appointment of the Auditors of the Court of Augmentation, that would be the period from which it would be most useful to commence the proposed enquiry, as from that time the office acquired the importance of judicial authority emanating from the Treasury, being, in effect, a transfer or delegation of that part of the *Treasurer's* duties to competent persons of rank and responsibility, and which never had formed any part of the business of the *Barons* of the *Exchequer* independently of the Treasurer, although, as ancillary to that high officer, they might often, in his presence, and under sanction of his authority, have assisted him in that duty as they were formerly sometimes wont to do, but not as a Court to whose competency their presence was necessary. By the terms of the commission to the Auditor, he was directed to  
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audit, &c. "and by and with the advice, authority, and consent of the Lord High Treasurer of *England*, the Chancellor, and Under Treasurer, there to determine, &c.;" the *determination* of the account being distinctly reserved to the original authority, the *heads* of the Court of Exchequer.\*

They then referred to *Madox* (Hist. Exch. cap. 24, sec. 7), for an account of the manner in which Auditors were anciently appointed by the Crown, which was in the same manner as the Barons and great men of the kingdom appointed theirs for auditing their own bailiffs' accounts, and of the duties of such Auditors at that period.

They next applied themselves to the consideration of the object, nature, and effect of the present bill, to shew that it could not, on principle, nor in form or substance, be supported. They observed that it would be attempted to be justified by the provisions of the 33 *Hen. VIII.* ch. 39, s. 79, giving power to the Courts in which subjects should be impleaded by the Crown to plead

\* The following is the commencement of the form of the appointment of Auditors of the Prest, by letters patent, in the reign of *Elizabeth*:—

"For certain good causes moving us, we do ordain and appoint, that from henceforth there shall be two Auditors, called Auditors of the Prest and Foreign Accounts—that they shall have power and authority to hear and determine the accounts of the Crown, in the same manner as the two Auditors lately appointed and assigned for the aforesaid purposes in the Court of Augmentation."

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in bar any good matter of discharge; but they contended, that a party could not be considered to be in a situation to avail himself of the equity of that act, unless some legal or equitable proceeding were pending against him in any of the King's Courts. That, they urged, was the result deduced by Sir *Edward Coke* from the case of Sir *Thomas Cecil* (a), who could not have filed his bill, if process had not been sued against him on his bond; nor could the Court have made a decree. They submitted, therefore, that as the Court could not now interfere to prevent the issuing process when the account should be declared, the present bill was at least premature, and could not be entertained till the actual commencement of a suit by the Crown, and by way of defence thereto. Such was the opinion of Lord *Somers* in the *Banker's case*, p. 148, who says, speaking of the stat. 5 *Rich. II.* c. 10, "The power (of ordering payment of money out of the receipt) is most directly restrained to the receiving of pleas in discharge of persons impeached for debts or accounts, and can never be extended to cases where parties come as plaintiffs to recover demands originally against the King; nor is there the authority of any law book pretended to warrant such interpretation." And they insisted, that the mode of proceeding now adopted was such as could not be rendered available or effectual against the Crown.

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They then suggested, that if the Court should be of opinion that it had jurisdiction in this case

(a) 7 Rep. 20.

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it would impose on them the duty of investigating the items of a most extensive account, most of it involving an enquiry into the price of provisions so long ago as that it could not now be ascertained. Having insisted, that in the present case there was no matter of law arising on any question depending on legal principles, which could even apparently justify the interference of the Barons as a Court of Law, they submitted, that to give the Court jurisdiction in it there must be an inherent right in them to take the accounts from the hands of the Auditors at any time, and under any circumstances, and to proceed themselves to the audit on the application of the accountant, which not only would render the office altogether insufficient and nugatory, but would draw to this Court a duty which could not be performed by means of its ordinary and only modes of proceeding in analogous cases — a reference to the Deputy Remembrancer, or (still less) by the intervention of a Jury on an issue; and they again strongly contended, that if the Court ever did possess such an authority over the ancient Auditors of the Court, or of the Imprest, since the statute of the 25th *Geo. III.* they had no longer any right to exercise it, all controlling power being by that act vested solely in the Lords Commissioners of the Treasury, with the two exceptions expressly provided for by the 20th and 23d sections of the act, by which this Court have now their separate duties particularly assigned to them. In all other respects, the Commissioners are declared to be entirely and exclusively subject to the direction of

of the Treasury, who, alone, have now the whole judicial authority under the act of Parliament, if indeed the Treasurer had it not before, and that wholly and exclusively at common law.

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They also pressed much, as an integral objection to this course of proceeding, its utter inefficacy, from the impracticability of affecting the Commissioners for auditing the public accounts through the medium of the Attorney-General, by any decree which the Court might make against him, which must be wholly nugatory as to him and them; because the Attorney-General has certainly no authority or control over the Commissioners by virtue of his office, or otherwise, and no power or means of compelling them to adopt any line of conduct which might effect the object of the party now applying to this Court; inasmuch as any decree which the Court might make as against the Attorney-General in such a suit as the present, could not be operative on the Commissioners, who were not before the Court, and would not be bound by any decision which the Court might pronounce against the Attorney-General; and he, on the other hand, had nothing to do with the conduct of the Auditors, and was not under any responsibility for their acts, nor liable for what the Commissioners should have done, and had no power to direct them as to what they were to do in the execution of their office.

Adverting again to the remedy by petition of right, as the only mode of redress open to the

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subject, they cited the authority of Lord *Somers*, in the *Banker's case*, who says, "I might proceed to very great numbers of instances where the subject was put to his petition for the allowance of just and reasonable pleas by way of discharge, upon accounting in the Exchequer" (a): and he cites (p. 150) *Everle's case*, (Ryley, 251), as an authority to shew that that was the proper and only remedy.

They finally contended, that whatever doubts might have formerly existed as to the authority of the Court of Exchequer in such matters, the Audit Act had entirely removed them, by constituting a competent Court for the complete adjudication of all matters of account between the subject and the Crown, entirely annulling thereby the obsolete Court of Accounts, which, in remote times, had certainly formed one of the constituent Courts of the King's Exchequer, and had established in its stead a tribunal better adapted for the prompt and efficient performance of that branch of the public business. They therefore submitted that this demurrer, founded on the ground of the Court having no jurisdiction over the subject-matter of the bill, ought to be allowed.

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22d, 23d Nov.

1806.

20th January.

*Plumer*, *Fonblanque*, and *Dauncey*, in support of the bill, contended, first, that the Court of Exchequer, "the sovereign Auditors of the Kingdom," as they are termed in the books of the

(a) *Banker's case*, p. 147.

highest legal authority (a), had full jurisdiction in the matter now brought under their consideration by this bill, to interfere both to urge and to control or check the Commissioners for auditing the public accounts in the exercise of their important duties;—and, secondly, that the mode of proceeding by bill against the Attorney-General, which had been resorted to and adopted upon the present occasion, was the proper and only course for redress to be pursued by parties in the situation of the plaintiffs, seeking, as they did, to be relieved from the consequences of the erroneous determination of the Commissioners for auditing the public accounts, by the interposition of this Court, in their behalf; whose duty it therefore was to relieve them, in a case like the present, where the facts, charged by the bill, and admitted by the demurrer, furnished the party complaining with an equity on which such a suit might be founded, and that therefore it ought to be entertained.

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They much pressed the topic anticipated that it was glaringly incompatible with the system and constitution of *British* jurisprudence, and every principle of the law of *England*, that a tribunal (if indeed the Board of Commissioners for auditing the public accounts could be so called) such as they formed, and constituted as they were, being nominated and appointed by the Crown should be subject to no sort of appeal. The particular duties entrusted to them were no less than the ad-

(a) Com. Dig. tit. "Court of Exchequer," D. 3.—Subdivi.  
"The Court of Accounts,"—and 4th Inst. 115.

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judication and determination of counter-claims, involving rights and interests often of immense pecuniary amount and great legal difficulty between the Crown and the subject accountant—the individuals being in no way connected with the law—and who, however well chosen they might be in point of integrity and all other moral respects, for their office, were deficient in a most essential and indispensable qualification for so important a charge in that they were persons who were not possessed of any legal knowledge or fitness, and could not therefore be properly invested with any judicial character or authority, without which they could not be considered competent to the ultimate discharge of such extensive powers. Yet such were the persons who were contended to be authorized to decide finally, and determine conclusively on all questions pending between the Crown and the subject, regarding the allowance of the articles of discharge in an accountant's accounts, without appeal or being subject to the revision or superintendence of any Court of law, erected for the due administration of justice in the kingdom: or at least with only the semblance of an appeal; for it was obvious that an application to the Treasury, a body in all respects of the same nature as themselves, if they were not merely a higher department only of the same office, and whose ultimate determination, if it were conclusive, would be open therefore to precisely the same objections as might be urged on the ground of that defect in the inferior branch of the same official body.

They

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They insisted, therefore, that there must exist somewhere a controlling and superintending power over the conduct of the Board of Commissioners for auditing the public accounts, that the dispensers of such power should be invested with a legal and judicial character, so as to form a competent constitutional tribunal, which might revise, and, if necessary, reform their acts; for those acts, involving to an incalculable extent the rights and claims of the accountant (although at the first glance they might appear to proceed and be founded upon the mere investigation of matters of account, and articles of charge and discharge, and sometimes of simple matters of fact) must often necessarily depend on the determination of nice, intricate, and important points of strict law, as when (which must frequently happen) the Commissioners would have to decide questions turning on the legal construction of contracts, or the admissibility of evidence and other difficulties in the solution of which legal knowledge must be necessarily requisite, and which could only be satisfactorily determined by lawyers, clothed with judicial authority.

They then submitted, first, that on the fair construction of the 25th Geo. III. the Board of Commissioners for auditing the public accounts, either were a body of officers, whose duty was chiefly ministerial, constituting, collectively under the authority of the act of Parliament, a minor branch of the Court of Exchequer, for the purpose of relieving it from the burthen and waste



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of time of performing those subordinate duties which the statute had therefore delegated to them : or it was at the utmost an inferior dependent tribunal, and even if distinct from the Court of Exchequer, still always subject to the ultimate control and jurisdiction of the superior Court, whose inherent and constitutional authority the statute has neither destroyed nor taken away, nor transferred ; and were the statute to be otherwise construed, the subject who might be aggrieved by any arbitrary and unjust determination of this official Board, would be wholly without means of redress for want of some legal authority to which he might appeal or complain, and the law would, for the first time, be found to endure an anomaly in the acknowledged existence of a possible wrong, without furnishing the means or power of providing a remedy.

They then proceeded to shew, by reasoning founded on documents produced, after a most extensive and laborious research from among the records of the Court — from the History of the Exchequer, since the earliest period known—from the nature and origin of its constitution and creation, and the objects of its power and duties — and from the continued usage and course of its practice, down to the present day, derived from the information of the various text writers and reporters particularly referred to hereafter in the course of the argument (*a*), and from the archives


(a) And see the judgment of Mr. Baron Graham, in the preceding case of *Ex parte Colebrooke*.

of the Court—that the *Barons* of the Exchequer had always been invested with, and had exercised exclusive jurisdiction *as a Court of law* at all times, in all matters any way affecting the King's revenue, and more especially in whatever related to the passing of accounts, as between the Crown and the subject; and that over all persons as well official as private; and they insisted, that if it could be satisfactorily shewn that this Court had ever possessed and exercised such jurisdiction as was now ascribed to it, it would be incumbent on those who should deny that it still possessed it to produce some strong authority for that proposition, or to shew that by some express and unequivocal act of Parliament it had been, in positive terms, destroyed or transferred; for they insisted that so important and weighty a consequence could not be established by any construction or inference, however apparently obvious, deducible from the mere constructive import or tenor of the language of an act of Parliament.

They affirmed, as the result of their united investigation, that no instance could be produced in history, or on record, of any Lord High Treasurer of *England*, or Treasurer of his Majesty's Exchequer, or since the disuse of that office\* the Lords Commissioners of the Treasury having ever

\* There is in the British Museum a MS. letter of *Camden*, (which was adverted to in the argument) wherein he states that he considers the Treasurer of *England* and Treasurer of the Exchequer to have always been one and the same office.

exercised

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appointed certain persons to take the ministerial and inferior part of that duty off their hands—probably that they might be enabled to give more of their time to the judicial functions of their office. Those ministers were variously denominated at different periods; sometimes they were called *Auditores compotorum Scaccarii*, and sometimes *Clerici ad compotos audiendos*. An oath was administered to them for their good abearance in their office, (*Mad.* vol. ii. ch. 24, s. 7,) and they officiated, in the first instance, as Auditors, the Court, that is, the Barons of the Exchequer, still holding a control over them, as the supreme Auditors of the public accounts of the realm, to whom they and all other succeeding Auditors of every description, however appointed or designated, and whether temporary or permanent, were always subject and responsible.

On the fact of the appointment, so frequent in the earlier periods of the business of the Court, of persons as special Commissioners for taking the Accounts (their attention having been directed to it, by the Court requiring an explanation of the nature and occasions of such appointments, on account of the difficulty which had occurred to them from their having apparently neither proceeded from, nor been under the authority of the Court of Exchequer, having always emanated wholly from the Crown), they observed, that such special commissions were applicable to three distinct classes of cases occurring under special circumstances — first, where the accounting party should require,

require, on his own behalf, as matter of favour, that his accounts should, in the first instance, be taken before persons who were competent to make him allowances beyond the amount of the money which had been imprested to him, as where he should have expended more than he had received; in which case, as the power of the ordinary Auditors of the Prest was limited to taking accounts of the money imprested, their authority was at an end when that should have been accounted for, and they might have considered themselves not entitled to give credit to the accountant for any thing beyond that amount.—2dly, they might have been appointed, with reference to the statute 2d *Henry VI.* ch. 10, to relieve the Court from responsibility in doubtful cases;—or, 3dly, where the articles of the accountants' charge or discharge had been furnished or paid abroad in a foreign country, or in *Ireland*, which might have been considered out of the jurisdiction of the Court of Exchequer, who were styled Sovereign Auditors in *England*; but in all those cases, they submitted, the Commissioners would still be and were subject to the control and authority of the Court of Exchequer.


In further illustration of the power of the Barons over the Auditors of the Crown, of the Court, and of the Prest, and indeed over all persons connected officially or personally with the public accounts, by reason of their acknowledged duties, as constituting the Court of Exchequer, they called the attention of the Court to the pur-  
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port and language of the following acts of Parliament, which had, from time to time, been passed in respect of the duties of the Court, and the powers with which it was ever considered to be invested.

The earliest in point of time (the 20th of *Edward* III. c.c. 1 & 2), commands the King's Justices of both Benches, and the *Barons* of the Court of Exchequer, to do right to all men, without regard of letters, and without delay.—The 5th of *Richard* II. ch. 9, the next relied on, is to the same effect, and moreover empowers them (the *Barons*) “to hear every answer of every demand made in the Exchequer, so that every person impeached or impeachable for any cause by himself, or by any person, shall be from thenceforth received in the Exchequer, to plead, *sue, and have his reasonable discharge* in that behalf, without tarrying or suing any writ or other commandment whatsoever.”—By the 10th Chapter of the same year, which was an act passed for securing to persons retained to serve the King in his wars or embassies, the benefit of their covenants, in respect of money then received by them; and for allowing them the advantage of those covenants in their accompt at the Exchequer, the *Barons of the Exchequer* are required “to do right to the party according as the *law* and *reason* demandeth.” And that act also provides, that “if any thing be due unto them by the same account, that thereof, by *certificate* of the same *Exchequer*, the *Treasurer and Chamberlains* shall make payment

or

or assignment to them without tarrying or suing other warrant or commandment of the Great and Privy Seal in that behalf." Then the 33 *Hen. VIII.* c. 39, s. 79, enacts, "that if any person, of whom any such debt or duty shall be demanded or required, allege, plead, declare, or shew, in any of the said Courts, good, perfect, and sufficient cause and matter in law, reason, or good conscience, in bar or discharge of the said debt or duty, or why he ought not to be charged or chargeable to or with the same, and the same cause, &c. being proved in such one of the said Courts, and every of them shall have full power and authority to accept the said proof, and to acquit and discharge him."—Lastly, the 13th *Elizabeth*, ch. 4, sec. 2, (which enacts, that accountant's lands shall, in certain cases, be sold to pay the Crown's debt) saves to the accountant the *allowance of all his due and reasonable petitions upon the same account*. In all those several statutes, they submitted, the legislature had distinctly recognised and uniformly acknowledged the inherent jurisdiction of the Court, as existing in the person and office of the *Barons*, in all things regarding the passing and allowing of public accounts, and in some of them had enjoined them (the Barons) to perform that duty on the behalf of the subject, of themselves and without other authority than their own constitutional jurisdiction. That duty is also noticed by the express terms of the oath of office (*a*), taken by the Barons, the 2d article of which is, "that

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(a) 4th Inst. ch. 11. p. 109.

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truly he shall charge and discharge all manner of people, as well poor as rich." The 4th article is, "nor none other person's right shall he disturbe, let, or respite, contrary to the laws of the land." The 8th article requires, "that as hastily as he may them (the people) goodly to deliver, without hurt, to the king." So that on the whole it fully appears they have not only the power, but it is their duty to take care that right be done on any complaint regularly brought before them of the Auditors in former times, or the Commissioners in the present day having neglected or perverted their duty in any respect, whether it tend to the injury of the Crown, or the aggrieving of the subject.

On the case of the Bankers, which had been much relied on in support of the arguments used in favor of the demurrer, they observed, that although the question there was entirely distinct from the present, as it concerned the then questionable power of the Barons to order an issue of the public treasure—yet in principle it was an authority favourable to the objects of this bill, as it had fully established the theory, that the Barons, as a Court, are supreme Auditors, and have authority over *the King's treasure* while yet *in transitu*, as was said by Lord Chief Justice *Treby*, in the course of his argument, (p. 142,) on a question involving no less a point, than whether the Barons had power to control, and so far command the Treasurer, (and that even, his Lordship considers a great and *arduous* point) as to order an issue of the public money on a claim submitted to them  
by

by a subject. His Lordship certainly was of opinion, that they could not do so *in that case*, necessarily admitting, that cases might occur in which they would have power so to order the Treasurer.

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Lord Chief Justice *Holt*, however, they observed, on the other hand, was of a different opinion even on that high question, and that very learned Judge's incidental *dicta* in that case, as well as those of the other Judges, are very strongly in favour of the opinion that the Court possesses the authority now contended for. He says, "if you make *the Barons* only Judges of the right of coming in of the King's money, you make them Judges but of half the business which belongs to that Court (the *Exchequer*), for the Barons have the *judicial power* over the *whole Court of the Exchequer*, and to say, that the Treasurer and *his officers* have no correspondence with the Court of *Exchequer*, is not true, for all the books take notice of them as persons that all belong to the Court of *Exchequer*." The same learned Judge also furnishes an answer to the suggestion, that the subject's proper and only course for redress in a case of this sort is by petition of right to the King.—He says, "suppose the King purchased land that is charged with a rent, the King must take the land together with its burthen, but in such case it would be hard to drive the grantee of the rent to his petition of right to the King. No, certainly, he may come to the Court of *Exchequer* by way of petition to the Barons, who may give him relief."



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As to the seemingly adverse *dicta* cited from Lord *Somers's* argument in the same case, they observed, that if taken as applicable to the subject-matter then before the Court, they would be found to be confined to that particular point which was founded on a mere naked demand of money due from the Crown, not at all affecting the present question of the authority of the Barons to make, or to order allowances to be made to an Accountant by the Commissioners for auditing the public accounts, which all the Judges who delivered their opinions in that case, either for or against the authority of the Court to order an issue of public money out of the receipt of the *Exchequer*, held to be the peculiar province of the Court; and their jurisdiction being on the one hand acknowledged to be plenary whilst the accounts were pending, was, on the other, contended to be wholly confined to questions arising while the treasure is *in transitu*.

They then brought forward the following various instances which had been found after a very diligent search among the records of the Court\* set on foot for precedents since the argument on the preceding petition of Sir *George*

\* These were furnished by the industry of Mr. *Vanderzee*; one of the sworn clerks in the King's Remembrancer's Office, who instructed the present Master of the Rolls, and the other counsel, who argued on the part of the plaintiff; and the Editor is enabled to vouch the known accuracy and learning of that Gentleman in this department, for the fidelity of the transcripts and extracts which follow.

*Colebrooke,*

*Colebrooke*, which they offered to shew the usage with respect to the controlling power of the Court over the Auditors of the Prest, and as fully establishing, as to them, the jurisdiction of the Court, by their constant exercise of it, to interfere on the part of the subject, and order the Auditors to correct and amend their determinations, as well on the allowance as on the disallowance of articles offered by Accountants in their discharge. The first material case produced by them was that of *Henry Slingsby*, the Master and Worker of the Mint\*, in *Easter Term*, 32 Chas. II. which was as follows.

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\* EXTRACTS from the original accounts, as altered by order of the Court.

In the margin—" *Officium Magistri & Operator' monstar' dni Regis Auri & Argenti, viz.*

" Ex'. T. DONE, Audr.

" *Declarat'. xxvij<sup>mo</sup>. die Maij, 1680.*

" L. HYDE.

" J. ERNLE.

" ED. DERING.

" S. GODOLPHIN."

One of the items, as disallowed, stands thus:

" *Pro damno & vast' sup triat' monet' auri & argenti in hoc anno xliiij s. Nil allocat' : Quia per Judic' Cur' Scctij onus portand' per magistrū & operator'.*"

The following is another disallowance:

" *Pro monet' dat' Capitolinis anglice, Wardens of the Tower, & al' hoc anno ut usualiter dat' fuit in regard' ad festum nati Dni. Nil.—Existen' disallocat' per Cur'.*"

These may serve as specimens of the whole accounts, which are very long, proceeding item by item through all the Accountant's articles of charge and discharge.

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32 Chas. 2.  
Sabi. 1<sup>o</sup> die  
Maij. Anglia  
Turr. London.  
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CASE.\*

On the motion of Sir *Robert Sawyer*, K. C. on behalf of his Majesty, (Mr. *Ward* having been also heard on the part of the Accountant, *Slingsby*,) it was ordered that Mr. *Slingsby* should produce unto the respective Auditors of the imprest, copies of the accounts then depending before them, and that they the Auditors should mark therein what sums they disallowed.—Counsel to be heard on both sides on *Friday* then next, and Mr. Chancellor of the Exchequer was desired to be then present in Court.† Afterwards, on the same *Friday*, the following order was made—reciting the former order and the hearing of his Majesty's Attorney and Solicitor General, and Sir *Robert Sawyer*, and Mr. *Lechmere*, on behalf of his Majesty, and Sir *Francis Pemberton*, K. S. L. Sir *Francis Winnington Pollexfen*, and *Ward* of Counsel for *Slingsby*, by the Chancellor, Chief Baron, and the rest of the Barons of the Court of *Exchequer*, concerning some of the allowances craved by the said Accountant, *Slingsby*, and which had been disallowed by the Auditors, both of the said Auditors of the Imprest being in Court—that the said matter concerning the said allowances should be further heard on a future day, to which it was accordingly adjourned, on which day, (the order proceeds), upon full hearing of the said counsel on both sides, and after long debate of the said matters, and upon consideration thereof

\* *Termino Pasche* an<sup>o</sup>. xxxij<sup>o</sup>. Car. sodi *Mercurij* xix<sup>o</sup>. die Maij.—*Lib. Min' & Ord' incipien' an<sup>o</sup>. 32<sup>o</sup>. Car. 2ndi. No. XII.*

† By minute entered, *East. Term*, 32d Chas. 2d.—*Mercurii* 28<sup>o</sup> die *Aprilis*, an<sup>o</sup>. 1680.—*Lib. Min. incipien' Term. Pasch. an<sup>o</sup>. 32<sup>o</sup>. Car. 2ndi.*

had

had by the Right Honorable the Chancellor, Chief Baron, and the rest of the Barons of the Court, it was ordered by the Court, that some of the charges disallowed should be allowed, and that so much of others which had been also wholly disallowed, as *Slingsby* should make oath that he believed were such as the King was to bear the charges of, and not himself, should be allowed, and that the residue should be disallowed, and so on, going through the whole of the account, although already passed by the Auditors, item by item: and the order concluded, by requiring the Auditors of the Imprest to make up the said account, and the several *subsequent accounts* of the said Mr. *Slingsby*, according to the directions in that order. Nine days after the date of that order, *Slingsby's* accounts were declared before the Lords Commissioners of the Treasury. The accounts so altered by allowing some charges, and disallowing others, refer to the order of the Court, and are marked "*per Judicium Curiae*," and sometimes "*per ordinem Curiae*," and sometimes "*per Curiam*."

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Having put forward the above case, although subsequent to some of the following, in order of time, as being directly and conclusively in point, in establishing the jurisdiction of the Court over the Auditors of the Imprest, before the appointment of the present Commissioners, they produced the following instances, to shew how frequently the Court exercised a directing and controlling authority over those officers, observing, that those instances having occurred since the

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25<sup>th</sup> Nov. Mich.  
Term, 3 Jac.KNEVYTT  
and  
MARTIN'S  
CASE.\*

reign of *Elizabeth*, they proved that nothing had been done on the establishment of Auditors of the Imprest, to render them independent of the Court of *Exchequer*.

In *Trinity* Term, 3 Jac. I. The Warden of the Mint (Sir *T. Knevitt*), and the Master Workers (Sir *R. Martin* and his son) of the monies, appeared in Court, and took their oaths according to the course of the Court, and two Auditors of the Imprest were assigned to take their accounts; and in *Michaelmas* Term following, time was granted to them by the Court to deliver objections to the Auditors, touching their accounts†.

Mich. Term,  
3 Jac. 1.Sir RICHARD  
MUSGRAVE'S  
CASE.

In *Michaelmas* Term, 3 Jac. I. Sir *Richard Musgrave*, Master of the Ordinance, having appeared in the Court of *Exchequer* to account, and an Auditor of the Imprest having been assigned to take it, he applied to the Court for time to finish it, and collect his discharges, which was granted.

Hilary Term,  
5 Car.Sir GEORGE  
CARY'S CASE‡.

They then produced a decree of the Court of *Exchequer*, in the case of Sir *George Carey*,

\* *Lib. Ord.* No. 3. p. 51 b.

† Without more particularly noticing the various other instances which were brought forward of the interference of the Court on similar applications, it will be sufficient to refer to the records from whence they were taken, viz. the Decree Books, and the Order Books, during the reigns of *James* the 1st, and *Charles* the 1st and 2d: the most important of them only are selected and stated fully in the argument.

‡ Decree Book, No. 3. *Easter* Term, 5 Chas. I. p. 347. Same Book, p. 352.

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(11th *February*, anno 5 *Car.*) which commenced by setting out the bill that had been filed by the then Attorney-General, in *Trinity Term*, 21 *James I.* against Sir *George Carey*, reciting, that he (having been Treasurer of the Wars in *Ireland*) had received money (1,800,000*l.*) by imprest, *to be employed in the business* of the late Queen (*Elizabeth*), and then King (*James*), as by five several accounts exhibited by him into the Court of *Exchequer*, and remaining of record there, appeared, in which said accounts the said late King had been greatly wronged by the errors, &c. and frauds therein committed, and more particularly in the 4th, and charging him to be indebted to his Majesty, in a considerable balance for so much, neither accounted for in his 5th account, nor transmitted in specie to *England*—and then follow the items complained of. The decree then stated the answer of his representatives, denying the errors and frauds, and other material allegations of the bill—that the cause coming on to be heard, (witnesses having been examined on both sides), the account was referred, by order of the Court, to two of the Auditors of the Prest, and two of the Auditors of his Majesty's revenue (by name), who were to report thereon, and they were thereby authorised, for their better information, to make use of the depositions which had been taken in the cause—that a certificate of their report was afterwards returned by them to the Court, submitting it for their consideration—that the cause was thereupon appointed to be heard again

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in the *Exchequer Chamber*, before the then Lord High Treasurer of *England*, and the Barons of the Court, in the presence of the counsel on both sides, when (the decree recites) the Court, being fully satisfied on reading the certificate of the said Auditors, (after long debate by the counsel on both sides), for that the Court conceived that the said *George Carey* ought not to be charged in his accounts with monies received by *Vry, Babington, and Robert Bromley*, for the reasons mentioned in the certificate, and accounts, and proofs, then read in Court, as well of the Auditors and others examined in the said cause, and for other matters appearing of record in this Court: and for that it also appeared that for the errors, frauds, &c. committed in the said accounts, by the said *Vry, Babington, and Robert Bromley*, there had been a former decree in this Court against them, of satisfaction to be made to his Majesty; and the Court being fully satisfied by the said certificate of the said Auditors, and by the other proofs then made in Court as aforesaid, and upon view of the said accounts, that the 3d, 4th, and 5th, accounts were just and true, and with much care passed and approved by two Auditors and six Commissioners, thereunto authorised by the then late King, under his Great Seal of *England*, above twenty years past, by which said commission, the said Commissioners thereunto authorised by commission under the Great Seal, by which they, being persons in great offices, and of great quality and trust about his then Majesty, had power to charge

charge and discharge the said *George Carey*, which discharge, under their hands and seals, should be to him, &c. a good, perfect, lawful, available, and sufficient acquittance and exoner-  
ation, and full discharge, &c. &c. it was there-  
fore "ordered and decreed by the Court, that the  
said cause, and the said defendant, should stand  
and be clearly and absolutely dismissed out of this  
Court for this matter, without any further motion  
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" *Per Barones.*"

[The Court enquired whether these cases now adduced had been brought before them on the former occasion of Sir *George Colebrooke's* petition, and being informed that they had not been then mentioned, they expressed themselves to be much impressed by their authority, and that they had materially affected their former view of the question.]

The last case produced was a decree in a cause of *The Attorney-General v. Beckford*, in the 29th Chas. II. By that bill, the Attorney-General, charging fraud, prayed that the defendant, who was a sloop seller to the Navy, might be ordered to produce his books, and come to an account.—The books being produced and examined, and the cause heard on the evidence, it was ordered by the Court, that the defendant

Term Pasch.  
an. 29<sup>th</sup> Car. 2<sup>di</sup>.  
Jovis 3<sup>o</sup> die  
Maij.The ATTOR-  
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\* Lib. Decret.' No. XII. p. 381.

should



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should go to account before the Auditors of Imprest, who were to be armed with a commission to examine witnesses, and the Commissioners and Officers of the Navy were ordered to bring in all books and papers relating to the defendant's accounts. The Auditors having made their report, exceptions were taken to it, and it was referred back to the same Auditors, and *one of the Auditors of his Majesty's Revenues in this Court*; and they, or any two of them, of whom the Auditor of the Revenue was to be one, were to review and correct the report as they should see cause. Their report was also referred back to *them, and another Auditor*, (the Court directing them very particularly as to the allowances which they were to make, and on what account). It was afterwards referred to the Commissioners of the Navy, at the request of the Attorney-General, and on their report, the cause came on finally to be heard before the Right Honorable Sir *John Ernle*, Knight, Chancellor and Under Treasurer of the Exchequer, and the Chief and other Barons, when, on reading all the reports and proceedings in the cause, and hearing counsel on both sides, the Court declared that the defendant had duly accounted, "and the said Chancellor, Lord Chief Baron, and the rest of the Barons, did *seriatim* and solemnly deliver and declare their judgments, that the defendant was not nor is guilty of defrauding his Majesty, or any others, in all or any the matters charged against him in or by the said information; and therefore it is this present day ordered and adjudged by the said

said Chancellor, Lord Chief Baron, and the said other Barons, and *by this Court and the authority thereof*, that the said defendant go without day as to the said information and the several matters and things therein contained, and be absolutely from henceforth discharged the same.

(Signed) J. ERNLE.

WILLIAM MONTAGUE.

TIM. LITTLETON.

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In all those cases they observed, generally, that it appeared the Barons had exercised jurisdiction over the Auditors, and that as a Court acting judicially, the Chancellor and Under Treasurer being *desired to attend*, as he might be on the present occasion, if the Court should think fit to interfere as prayed by the bill.

Assuming then that they had established their position, that, during the earlier periods of the history of the Court of Exchequer, up to the 25th year of the reign of *Geo. III.*, the Court had exercised a jurisdiction—a judicial controlling authority over the Auditors of the public accounts, by whatever name they might have been called, and in whatever manner appointed, and that whether as officers of the Court, or of the Crown; they then proceeded to inquire whether the act of Parliament (25th *Geo. III.* ch. 52.) had either destroyed, diminished, or transferred that authority which the Court of Exchequer had been

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been shewn to have possessed and exercised up to that time: or whether, by substituting Commissioners for auditing the public accounts in the place of the Auditors of the Prest, the legislature had rendered the new officers independent of that controlling power which the Court judicially exercised over the more ancient. And they insisted that the onus lay on those who supported this demurrer, to shew that the act of Parliament had expressly taken away the ancient inherent judicial control of the Court of Exchequer over all persons appointed to the duty of passing the public accounts; but yet they undertook to shew that the statute had not only not done so, but had by its provisions more than reserved to the Court its authority entire, for it had in some respects augmented it. For that purpose they relied much on the 8th section, providing that the Commissioners to be appointed under the authority of the act having been declared to be invested with all the powers and authorities, should be subject to the performance of the same duties, and liable to the same control which the Auditors of the Imprest then were by law, usage, or custom, subject or liable to, except as the same are or should be altered or affected by that act; and they submitted that it was the duty of the Court to exercise that control which they were acknowledged to possess for the benefit of the subject, whenever in a proper case application should be made to them for that purpose. They then proceeded to various other clauses of the act, on which they reasoned

reasoned in the same manner as Mr. Baron *Graham* will be found to have done in the course of his judgment in the preceding case,\* deducing the same conclusion.

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On the point of the propriety of the present mode of proceeding as adapted to accomplish the object of the complainant, its consistency with the course of practice, and its ultimate efficiency, they adverted to the following cases, from the books, in addition to those already cited from the records of the Court, (which they observed, would of themselves have been sufficient to warrant the course adopted in this instance) as establishing that it was not only according to the practice of the Court in all similar cases, but that there was no other mode by which redress could be sought—*Sir Thomas Cecil's case (a)*, *Sir William Hix v. The Attorney-General and Cooper (b)*, *Whitehill v. The Attorney-General and others (c)*. On citing the next case of *Pawlett v. The Attorney-General (d)*, they remarked that that was a particularly strong authority in favor of the complainants in this bill, both as establishing, (after very much argument, in which the question of the proper course being by petition of grace and favor, was discussed) on deliberation, that the subject might be relieved in *equity* against the king: and that by means of a suit by bill

(a) 7 Co. Rep. 19.

(b) 1 Hardr. 176.

(c) 1b. 395.

(d) 1b. 465.

\* See the judgment, ante, from page 119 to page 127.

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and others.

against the Attorney-General, who, they insisted, had been properly made defendant in the present case. They also cited *Burgess v. Wheate* (a), a MS. case of *Fitch v. The Attorney-General* (b), and *Ex parte Durrand* (c). And they insisted, as the result of all those authorities, that the subject had a right to compel the Commissioners for auditing the public accounts, by means of the decree of this Court, to do the accountant right and justice as between him and the crown; and that by bill against the Attorney-General; and therefore the complainants filing the present bill were entitled to a full answer from him, and consequently the present demurrer ought to be over-ruled.

The *Attorney-General*, in reply, disclaimed any general denial of the jurisdiction of the Court of Exchequer over the accounts of the king's revenue, insisting, however, that their jurisdiction did not extend to permit them to interfere to regulate or control the conduct of the Commissioners for auditing the public accounts, appointed by the 25th *Geo. III.*, in the course of the duties intrusted to them by that act; for that they were thereby invested with a concurrent jurisdiction with this Court in all matters of account. He contended, that the remedy by petition of right, in cases of similar supposed grievances, was not taken away by any statute, neither had a right of suing the Crown, in the first instance,

(a) 1 Blacks. 123.

(c) 3 Anstr. 743.

(b) *Trin. T. 10 Wm. 3.*

by bill in Equity, been given to the subject—that there was no foundation for such a right, and that the establishment of it would be mischievous and dangerous. He insisted, that the instances which had been adduced, during the period of the reign of *James the First*, as cases wherein this Court had interfered to control the Auditors conduct, by ordering a revision of their acts, had all been in point of fact authorized by letter of privy seal, issued for that express purpose, by that King, at the commencement of his reign, enabling this Court to do what otherwise it would not have had authority to have done.

1819.

1827.

Commons  
and others  
v.  
Attorney-  
General  
and others

Another objection was also now taken to the present bill—that it called upon the Court to interfere to direct the Auditors in mid-course of their duty, and before they had completed the act which was made the subject-matter of complaint. He took a distinction, founded on the mode of proceeding which had been adopted, between the present case and the instances already referred to, that although the subject could not proceed by bill against the Crown, but was restricted to the petition of right, the Attorney-General might apply by information, and he was in all those cases the acting party. As to the cases cited from the books where the Attorney-General was made defendant to the bills, he observed, that there were in almost all those cases suits actually pending against the complainant, or other persons were defendants with the Attorney-General; and he admitted that a party

1819.

1807.

COLERBROOK  
and others  
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and others.

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party so impleaded in this Court might apply by bill to the Court for relief, when the remedy which he would obtain would be in the nature of an injunction, and then the great difficulty opposed to the plaintiffs in the present case could not arise, namely, as to what judgment the Court could pronounce, or whether it could make any decree at all.

He ultimately adverted to the ground on which the case for the Crown was put at the commencement, that if the Court of Exchequer had ever had a jurisdiction to interfere in the way now prayed, that power had been virtually, if not expressly, taken away by the particular provisions and general tenor of the 25th *Geo. III.*, and was transferred entirely and exclusively to the Treasury; and that therefore this Court had no jurisdiction to entertain the present bill.

*Cur. adv. vult.*

1807.

20th February.

The Court (consisting of *Macdonald*, Lord Chief Baron, and *Hotham*, *Thomson*, and *Graham*, Barons) this day pronounced judgment, by declaring the

Demurrer over-ruled.\*

\* The Attorney-General then put in a full answer on the merits, but the cause was afterwards put an end to by compromise.

ROOTH

1819.

ROOTH v. QUIN and JANNEY.

Friday,  
30th April.

THIS was an action by the indorsee against the defendants as acceptors of two bills of exchange, dated the 5th *January*, 1814. The defendant *Quin* had suffered judgment to go by default. *Janney* pleaded the general issue. On the trial at the Sittings after *Trinity* Term 1816, before Mr. Baron *Richards*, a verdict was found for the plaintiff for the amount of both bills, subject to the opinion of the Court on the following case:—

*Semble.* A partnership firm may protect themselves from liability to pay bills accepted by one in the name of all the firm, by notice by public advertisement in newspapers, proved to have been received by the payee and indorsee, that the partnership is dissolved; although the dissolution has not appeared in the *Gazette*; and that even where the partnership is not for a definite and limited period, or might be dissolved at pleasure, but is for a stipulated continuing term, dissoluble only on certain conditions, which have not been performed: so

The defendants carried on business as cotton manufacturers at *Manchester*, in co-partnership, for several years, before the bills in question were drawn. The bills were accepted by the defendant *Quin*, in the co-partnership name, and indorsed to the plaintiff. The partnership between the defendants commenced in the month of *February* 1803. There was no written agreement between them as to the duration of the partnership; but the terms upon which they began, and agreed to carry it on, were, that it should be for the

that it is doubtful whether the partnership continued to exist in point of law or not, and there was no special contract among themselves, that the firm was not to be liable for the acts of individual partners.

In an action against other partners on a bill accepted by one in the name of the firm, the admissions in his answer filed to a bill in equity against him, are not admissible in evidence against the rest.

If the plaintiff, in such an action, be an indorsee, the defendants must shew that the payee had notice of the resolution of the rest of the firm to dissolve the partnership, and be no longer answerable for any such bills: and if that be not done, it is not sufficient to prove that the indorsee had notice, for he is entitled to avail himself of any circumstance which would operate in favour of the payee.



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 ROOTH
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term of *five years* certain, and for such further time as they should agree upon; and that if either party should, after the expiration of the said term of five years, be desirous of withdrawing himself from the concern, he might do so upon giving *six months notice of such his intention* to the other party, or *forfeiting the sum of 200*l.** The capital to be advanced by *Janney* was 600*l.* and by *Quin* 300*l.* and each was to have an equal moiety of the profits, and the said sums were actually advanced.

On the 5th *June*, 1813, the defendant *Janney*, who wished the partnership to be put an end to, caused to be inserted in three of the *Manchester* papers this advertisement. "The partnership heretofore subsisting between *James Quin* and *Joseph Janney*, both of *Manchester*, in the county of *Lancaster*, manufacturers and merchants, under the firm of *Quin* and *Janney*, is this day dissolved." Several copies of these newspapers were taken at a news room, where the plaintiff was very much in the habit of reading the public papers. The plaintiff, on or about the 5th of *June*, 1813, received a circular letter, dated 4th *June*, addressed to him by *Janney*, in these words: "The partnership heretofore subsisting between Mr, *James Quin* and myself, as manufacturers and merchants, under the firm of *Quin* and *Janney*, was this day dissolved. I have to request you will not sell any goods on the credit of the above partnership, as I shall not be answerable for any debts which, from henceforth may be contracted in the partnership

partnership name, or on the partnership credit." The defendant *Janney* also about the same time sent a notice of the dissolution of the co-partnership, signed by himself, to the *London Gazette* office, to be inserted in the *London Gazette*; but the person who had the conducting of the *London Gazette* refused to insert it, as it was not signed by the defendant *Quin*.

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&
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No notice was given by the defendant *Janney* to the defendant *Quin*, of his intention to withdraw himself from the said partnership six months before the said 4th day of *June*, nor did it appear that any notice at all was given by the defendant *Janney* to the defendant *Quin*, of such intention: nor did the defendant *Janney* pay the said sum or penalty of 200*l.* to the defendant *Quin*. The defendant *Quin*, after the 4th of *June*, 1813, continued to trade, using the firm of *Quin and Janney*, and the bill for 150*l.* was accepted by him in that name, after the said 4th day of *June*, 1813. The plaintiff's answer read on the trial by the defendant, stated that the plaintiff had been informed and believed that the bill was drawn in payment of a debt due from the defendant before the said 4th of *June*, 1813, to *William Kirkpatrick* (the drawer, payee, and indorser.) Both the bills were fairly indorsed to the plaintiff, for a full and valuable consideration, and without any collusion with the defendant *Quin*.

When the defendants had closed their case, the plaintiff, who at first made out a *prima facie* case

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only on the bills, offered, in evidence, a bill in Chancery, filed by the defendant *Janney*, against the defendant *Quin* and the plaintiff, and the defendant *Quin's answer thereto*. The admissibility of this answer in evidence was objected to by the defendant *Janney*, who defended separately. That answer, amongst other matters, stated, that the defendant *Quin* refused a proposal by the defendant *Janney*, to dissolve the partnership, unless all the co-partnership accounts were adjusted by reference to an accountant; and thereupon the said defendant *Janney* took upon himself to attempt to put an end to it; and on the 2d of *June*, 1813, entered the partnership warehouse during the night, and took away the books and accounts, and the stock and utensils of the trade, and sold the same, no part of the proceeds of which he had paid to the defendant *Quin*, and inserted the said notice in the newspapers, and sent the circulars above mentioned:—that in the month of *March*, 1813, the defendant *Quin* gave the defendant *Janney* 120*l.* to pay part of the debt due to *Kirkpatrick*, which debt was due in *May*, 1812, for goods sold, and for which the above mentioned bill of 150*l.* was given in payment, but that such sum was appropriated by the said defendant *Janney*, to his own use;—that since *June*, 1813, the defendant *Quin* had carried on trade under the firm of *Quin and Janney*, for the benefit of the said partnership, not conceiving the same to have been regularly dissolved, and that a debt of 189*l.* was contracted after the 4th of *June*, 1813, that is to say, in *January*,

1814,

1814, with *William Carson* (the drawer, payee, and indorser of the other bill), for goods sold by him in *January*, 1814, for the use of the business, which the defendant *Quin* carried on for the benefit of the said partnership, in the partnership name; for which debt the above-mentioned bill of 189*l.* was accepted by the defendant *Quin*, in the partnership name—and that the said bills were not indorsed to the said plaintiff, in order to enable him to obtain payment, and that there was no collusion between the plaintiff and the defendant *Quin*, in respect thereof.

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The first question for the opinion of the Court was, whether the answer was admissible evidence of the facts therein contained, or any of them. If the Court should be of opinion that it was, then such facts were to be considered as part of this case, and a copy of the said bill and answer might be referred to by either party. If not, they were to be rejected.

The second question was, whether the plaintiff was entitled to recover in respect of both or either of the bills. The verdict, in that case, to be entered accordingly for the plaintiff, on both or either of the bills—otherwise for the defendant, in the same manner.

The case was first argued in *Hilary* Term, 1818, but Mr. Baron *Wood* having, on that occasion, noticed that the special case was defective, in not stating a very material fact,—namely, whether

1818.

 4th Feb.

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the payee had had notice of the matters now urged against the liability of the partners; for if he had not, the indorsee would be entitled to avail himself of any circumstance which might have been used on behalf of the original payee:—the case was therefore sent back to be amended in that respect: and it now came on again to be argued upon the questions raised by the state of facts,

Parke, in support of the verdict, contended, first, that the admissions in the answer of the defendant *Quin*, were admissible in evidence against the defendant *Janney*, in this case, citing the authority of *Grant v. Jackson (a)*, where Lord *Kenyon* held, that although the answer of a defendant in that case was not admissible to prove the partnership, yet when once a partnership was established, the admission of one would bind all, and that because when the answer was put in, the defendant was equally liable with the others; and he also cited the case of *Wood* and others, Assignees of *Hussey v. Braddock (b)*, on the same point, where it was determined, that an admission, made by a partner after the dissolution of the partnership, concerning joint contracts made during the existence of it, concludes the other partners, but

The Court intimating that they were against him on that part of the case, for that it was a rule in Equity not to receive the answer of one party against another, under such circumstances,

(a) *Peake's N. P. C.* 268, (3d edit.)

(b) 1 *Taunt.* 104.

called

called on him to support his verdict on the other ground.

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He then submitted, that *Janney*, as the partner of *Quin*, was bound by the acts of the latter during the subsistence of the partnership — that the partnership between them was subsisting in point of law, at the time when the bills were drawn, it not having been regularly or effectually dissolved — that it was not in the power of one partner, where there was a permanent partnership established by agreement for a given period, or as in this case dissoluble only on certain terms and conditions which had not been observed and complied with (for six months notice had not been given, nor had the 200*l.* been paid) to dissolve such a contract by mere notice of its dissolution, or thus to discharge himself of all the legal liabilities inseparable from his legal character.

On the principle of partnership obligations with respect to third persons, and the power of one of several partners to bind the rest, he cited the case of *Peacock v. Peacock (a)*, where the Lord Chancellor took a distinction between such partnerships as are of definite, and such as are of indefinite duration, observing, that where partners are not under agreement for any precise period, they may dissolve at any time, subject only to the proper accounts, the converse of which must be, that where there be such an agreement, the part-

(a) 16 Ves. 49.

1810.  
 ROOTH  
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nership cannot be so dissolved; and the same proposition was laid down by the Master of the Rolls in the case of *Featherstonchaugh v. Fenwick (a)*.

[Wood, *Baron*, enquired if it was meant to be contended that a partner was so inextricably bound by his articles as to have no means of freeing himself by notice or otherwise, from the engagements of an improvident member of the firm; in answer to which it was submitted, that he would generally be so involved as a partner, unless protected by the special terms of his original engagement, and notice were given to the public.]

*Littledale, contra*, insisted, that the partnership in the present case had been dissolved, by what had passed between the parties, and that the defendant *Quin* had no right or power at the time when he accepted the bill in question, to charge the other defendant.

The Court suggested here, that from the shape which the question had assumed, it should be argued as if it were (admitting the continuance of the partnership) whether the defendant *Janney* could protect himself from debts incurred by the acts of *Quin*, by the notice which he had given, that he would not be answerable for any debts contracted in the partnership name.

It was then submitted, that he was protected by such notice, and that the point had been already decided by recent cases. In *Lord Gallway v. Mathew and Smithson (a)*, it was held by Lord *Ellenborough*, that the authority of a partner to draw bills was only an implied authority, and not essential to a partnership; and that that implication might be rebutted by notice being shewn to have reached the person taking such bills that the firm did not authorise individual partners to draw in the name of the whole, and on that ground the Court proceeded in refusing the rule. So also was it in the case of *Willis v. Dyson (b)*.

1812.  
ROOTE  
v.  
QUINN  
and  
JANNEY.

*Parke*, in reply, relied on the fact that the present partnership was not for a limited time, or determinable at pleasure, but for a definite period, and to continue with all its legal consequences till certain acts were done by such of the partners as might wish to dissolve it: and he insisted, that until that time they would all be necessarily liable to the responsibilities incident to such an engagement, and on that he submitted

(a) 1 Campb. N. P. 403, and 10 East, 284.

(b) 1 Starkie, 164°.

The Court took occasion to observe, that it was with much reluctance they received determinations at *Nisi Prius*, on questions brought before them for more deliberate consideration, however high the authority cited might stand in their estimation; and expressed a desire that the citing such cases might be discontinued, on occasions requiring more elaborate research.

the



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the distinction was founded, which took this case out of the principle of the determinations which had been cited; for that it does not appear from the reports of those cases, what was the nature of the partnerships there, as whether their dissolution had been made to be subject to certain conditions, or whether they were for a limited term, or to depend wholly on the will of the parties—that from all that appeared, they were most probably of the latter description: and the determinations in those cases, he observed, seemed to be grounded on an assumption of fraud and collusion between the partners, whereas in the present case such an inference was expressly negatived by the finding of the Jury. So that there was as yet no decision on the point applying to the present case, which was one requiring from its importance and frequency, most mature consideration, as seriously affecting the daily transactions of mercantile people.

RICHARDS, *Lord Chief Baron*, (having read the material parts of the case of *Lord Gallway v. Mathew*). It appears from that case that Lord Gallway gave Mathew his acceptance as a loan: and that it was done at some personal risk; which, although not adverted to in the judgment of the Court, is certainly, as reported in the printed case, a very material feature in the circumstances. Lord *Ellenborough's* judgment is however delivered in very general terms, and deserves serious consideration. This is undoubtedly a question of vital importance to the commercial world

world, and therefore the Court think that there ought to be a new trial, on which occasion a bill of exceptions may be tendered, or some other course adopted which may carry the question farther, that it may receive the most solemn decision.

1819.  
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 ROOTH
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Per Curiam. There must be an order for a

New trial,—on payment of costs.

The Court were all clearly of opinion that the answer of *Quin*, which had been tendered in evidence, was not admissible as against *Janney*.

ONIONS V. NAISH.

1st May.
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*LITLEDALE* moved to set aside the verdict given for the defendant in this action, which had been tried before the Chief Baron at the last Sit-tings, and for a new trial, (the costs of the day to abide the event) on an affidavit made by the plain-tiff, stating that the trial having been postponed from a former day, the defendant, in the mean time, obtained a rule for a special jury—that when the cause was called on only eight special jurors were

The Court will not grant a rule for setting aside a verdict on the affidavit of the failing party, stating that one of the Jury was a relation of the successful party, and that they were in habits of friendship and intimacy together, and particularizing the various instances and expressions on

the part of the jurymen, of partiality and prejudice—which are detailed in the body of the case.

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ONIONS  
v.  
NAISH.

were sworn — that of the four common jurors added, one was a relation of the defendant, with whom, both at his house and elsewhere, the defendant had been in the constant habit of associating familiarly, and on terms of intimacy and friendship during the whole of the interval between the postponement and trial of the cause; and that he (the Jurymen) had during that time frequently expressed himself in strong terms in favour of the defendant's case: and the affidavit mentioned various instances of a display of prejudice in favour of the defendant, all which the plaintiff swore had come to his knowledge during and since the trial of the action.—The affidavit also stated, that the deponent had reason to believe that the Jury had given their verdict under a misapprehension of certain points in the case; but

The Court refused to grant a rule to shew cause, observing, that it would be a very dangerous precedent to set aside a verdict, upon such grounds as were now offered in support of the present application.

*Nil.*

**BLEN**

1819.

BLIGH v. BERSON.

1st May.

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**BLIGH** moved that the defendant in this bill (which was a suit for tithes) might be ordered to produce and leave in the hands of his clerk in court, a book made and kept by a former rector of the parish, relating to the tithes of the parish, then in the possession, power, or custody of the defendant.

The Court will not, on a bill for tithes, praying a discovery of documentary evidence, order a title book of a former rector, shewn to have been in the possession of the defendant's attorney, to be produced, unless it clearly appear from admissions in the answer that it would assist the plaintiff's case.

The possession of the attorney however is within the control of the plaintiff.

But where the Court refuse such a motion for the above reason, they will not do so with costs, if enough be shewn to give colour for the application.

He stated that he founded this motion on an admission in the defendant's answer, that the book now required to be produced, was in the custody of the defendant's attorney, and related to the matter in issue, and that it would furnish evidence in favour of the plaintiff, and he read the following passage, (which was in answer to an interrogatory, whether the book was not in the custody of the defendant, and whether (in substance) it would not appear therefrom, that the pretended modus was in fact only a part of a general composition, contributory amongst the whole parish) as making such admission. "He (the defendant) hath been informed, &c. that a certain book relating to the tithes of the parish of *Romaldkirk*, which was kept by Dr. *Browell*, who was formerly rector of the said parish, was produced by the defendant's attorney, but not by the defendant at the trial in the said amended bill, and former answers of the defendant mentioned; and that it was so produced

with

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 BLIGH  
 v.  
 BERNON.

with the view of proving that the modus or ancient customary payment of twelve shillings and nine-pence in and by the former answers of the defendant insisted upon with respect to the farm or lands called *Doe Park*, in the occupation of the defendant, was a good and valid modus, or ancient customary payment, covering tithe of agistment, and all prædial tithes in respect of the said farm or lands;" and he denied that the book was or ever had been in his possession. In a subsequent part of the amended answer, the defendant stated, that he had been informed and believed, that there were in the said book entries of divers sums under the denomination of tithe farm, but did not know if such sums amounted to the sum stated by the plaintiff as being the composition, but that if there were such entries, and if they were of such amount, yet the defendant insisted that the validity of the modus did not depend upon any other payments for any other part of the parish.—Upon those passages it was submitted to the Court that the plaintiff was entitled to the production of the book by the defendant, the possession of his attorney being his possession, and was subject to his control; *Wright v. Mayer (a)*, *Fenwick v. Reed (b)*—and that the subsequent admissions in the answer, shewed that the book contained matters favorable to the plaintiff's case. And it was further contended, that the book itself was not, from the nature of it, such a document as the defendant was entitled to the exclusive possession of, or to give in evidence on his own behalf only.

(a) 6 Ves. 281.

(b) 1 Mer. 123.

*Lovat* was to have opposed the motion, but the Court did not require to hear him.

1812.  
Blich  
v.  
Baron.

The *Lord Chief Baron*. This book is part of the defendant's evidence, and the rule is clear that you have no right to call upon your opponent in this way to expose his case to his adversary. It would be opening a wide door to perjury. Besides, you must shew in all cases of an application for production of papers, that they would be evidence making in your favor: and that must be shewn by admissions in the defendant's answer. Now here there is nothing like an admission even under the "if," that the book, when produced, would assist the plaintiff's case.

The Court therefore refused the application.

*Lovat* then applied for costs, which

The Court refused: the *Chief Baron* giving as the reason that the application was not without some colour; for although the Court would not compel a defendant on a bill for discovery to disclose his evidence; yet it was also a rule, that, when the plaintiff could shew that the defendant was in possession of evidence which might serve him if produced, it would be against conscience to allow him to withhold it—that here it had been shewn that the defendant possessed a book (for the possession of the attorney was under the control of the defendant) which in great probability at least might have contained evidence favourable to the plaintiff's case, although it was not sufficiently

1819.

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BLIGH

v.

BENSON.

ciently admitted by the answer to authorize the Court to grant the application.

Per Curiam.

Motion refused,
without Costs.

1819.

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7th May.

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The rule of this Court (1st February, 1792) is, that exceptions set down for argument are to be called on at the sitting of the Court; the effect of which is, that where the plaintiff does not attend to support them, they are to be struck out, and the defendant may then move, as of course, that they be over-ruled—and where the defendant does not appear, they are allowed.

MEMORANDUM.

BY minute of this date, the Court announced, that on and after *Monday* next, they would strictly adhere to the rule of the 1st *February*, 1792, touching the argument of exceptions at the Sitting of the Court.

The effect of that order is, that where plaintiff does not appear to support them, the exceptions would be struck out, and defendant might then move, as of course, that the plaintiff's exceptions be over-ruled, not being brought on according to the course of the Court; if, on the other hand, the plaintiff appears, and the defendant does not attend to argue the exceptions, they are then allowed.

BEESTON

1819.

Saturday,
8th May.


BEESTON v. WHITE.

COMYN, in last Hilary Term, obtained a rule, requiring the plaintiff to shew cause why the writ of *fieri facias*, issued and executed in this cause, should not be set aside, on the ground that the defendant had obtained his certificate under a commission of bankrupt, and for other irregularity, on an affidavit, which stated the following facts. The plaintiff had brought an action against the defendant for damage done by his barge to that of the plaintiff, which came on to be tried at the Summer Assizes for *Berkshire*, in 1816, when a verdict was taken for the plaintiff for 2000*l.*, the damages laid in the declaration, subject to the arbitration of a barrister, who was to make his award by the 4th day of the following *Michaelmas* Term. The arbitrator afterwards, on the 1st of *January*, 1817, (the rule having been enlarged) awarded to the plaintiff 801*l.* for his damages and costs, and the plaintiff, on the 8th, signed final judgment, which he entered as of *Michaelmas* Term, 1816. On the 7th of *December*, 1816, the defendant having become bankrupt, a commission of bankruptcy was issued against him, and he obtained his certificate on the 10th of *December*, 1817. The plaintiff sued out a writ of *fieri facias*, on the 15th of *January*, 1819, under which the sheriff levied on the same day, taking certain goods and chattels in the possession of the defendant, to a

A defendant, against whom in an action for damages, on a tort, a verdict has been taken, subject to the award of an arbitrator, held to be discharged from the debt by his certificate, obtained before the entering up of judgment, where he had become bankrupt, between the verdict and the making of the award, and that execution could not be sued out on the judgment; because the plaintiff might have proved the damages recovered under the commission by production of the record.

Nor can he support such execution for the costs.

A *fieri facias* issued on a judgment entered up under such circumstances, and executed, set aside on the terms of the defendant undertaking to bring no action against the sheriff.

1819.

 DEXTER
 v.
 WHITE.
 1819.

considerable amount, then detained by him (the sheriff), and which was stated to be not the property of the defendant, but of other persons by whom he was employed as a lighterman and carrier.

Under these circumstances, it was urged, that as the judgment which had been signed in this case, related back to the first day of the preceding term, (*Bragner v. Langmead (a)*) the plaintiff was entitled to prove his damages under the defendant's commission: and that not having done so, he was barred by the certificate.

Puller shewed cause. He contended that the amount of damages having been referred to an arbitrator, the plaintiff had no perfect right to any liquidated sum, and therefore could not, at the time of the defendant's bankruptcy, have proved any debt under the commission; for if he had proved for the whole sum found by the verdict, it would have been expunged—that the defendant was not discharged from this debt, by the operation of the bankruptcy, the statute 5 *Geo. II. c. 30, s. 7*, having only provided for his discharge from all such debts as should be *due* from him at the time when he became bankrupt, and the plaintiff's demand of damages for the present tort, could not become a debt till the arbitrator should have made his award, which was subsequent to the defendant's bankruptcy, and was not therefore till that time proveable under the commission; and he cited the authority of the Court of

(a) 14 East, 197.

King's Bench, in the case of *Ex parte Charles (h)*, where it was held that a sum of money given by a Jury to a plaintiff, who sued for a breach of promise of marriage, and had entered up judgment on the verdict, was not a sufficient petitioning creditor's debt, to support a commission against the defendant, who, between the verdict and entering up judgment, had committed the act of bankruptcy. He also submitted, that an action could not have been maintained on the verdict, until the damages had been ascertained by the arbitrator; nor could judgment be entered up in this case without a rule for signing it previously obtained by leave of the Court, *Hayward v. Ribbans (b)*. Admitting for an instant, however, that the plaintiff had no right to sue out execution for the damages recovered, he still might do so for the costs, which were part of the debt, and which clearly could not be proved under the commission, according to the decision of the Chancellor, in the case of *Ex parte Hill (b)*.

18.
1810.
Briston
v.
White.

Cur. adv. vult.

RICHARDS, *Lord Chief Baron*, now delivered the judgment of the Court: the short substance of which was, that the plaintiff ought to have proved his debt under the commission; as he might have done, the damages being a debt of record; and the record alone sufficient legal evidence of it. And he observed, that if an action had been

8th May.

(a) 7 T. R. 20.

(c) 4 East, 310.

(b) 11 Ves. 646.

Q187

1810

Baker

White

1810

brought upon the judgment, instead of suing out execution upon it, and a plea of bankruptcy had been put in, the proper evidence would have been an examined office copy of the record, which would be conclusive.

The Court therefore made the rule absolute, for setting aside the *fiery facias*, and restoring to the defendant the goods which had been seized—requiring, however, that the defendant should undertake not to bring any action against the sheriff of *Berks*.

IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, LORD CHIEF BARON.

Monday,
10th May.

2 Hall 648
KIRKBANK and Others v. HUDSON and Others,
and the ATTORNEY-GENERAL.

A gift of the residue of a testator's personal estate to trustees for the perpetual endowment and maintenance of a school, would be a valid bequest, and not within the statute of the 9 Geo. II. ch. 36.

18 Bea 320
THE plaintiffs, the next of kin of the testator, filed this bill to obtain a declaration by the Court that

But if after such completed bequest, the testator goes on to recommend the trustees to collect the residue, and lay it out at a convenient time in the purchase of freehold lands, &c. for that purpose, it comes within the statute, because the word "recommend" is imperative on the trustees, and leaves them no discretion, but raises a trust, which must be carried into execution, unless there be in some other part of the will an express option given to them in terms so to lay out the money, or not, in their discretion.

that the following gift and bequest in the will of *Richard Dickinson*, was void, and for an account and distribution.

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~~Richard Dickinson~~
 and others.
 &
 Hudson
 and others.

The testator, (having by his will given to the defendants *Thomas* and *Samuel Hudson*, all such freehold and other messuages, lands, &c. as were vested in him by way of mortgage, for the purpose of enabling them to reconvey,) gave and bequeathed (after payment of all his debts, legacies, and funeral expences &c.) the residue in these words:—"I give and bequeath all the rest of my monies, goods, effects, and personal estate whatsoever, to be a perpetual endowment or maintenance for two schools:" (naming them) and he appointed the said *Thomas* and *Samuel Hudson* (the trustees) and the survivor of them, and the rectors for the time being of the parishes in which the schools were, and their successors, for ever, patrons of such schools, with certain directions as to their conduct." Then, after giving his library of books, and his book-cases, to the two schools, he proceeds thus:—"And I recommend that at a convenient time my money shall be collected together, and laid out in the purchase of a freehold messuage and tenement or lands which are freehold, to be a perpetual endowment for the two schools, by an equal portion to each of the schoolmasters in every year, after all incidental expences are paid; provided, and my will is, that my estate and effects so vested in trust shall be suffered to accumulate until the annual proceeds shall amount to 100*l.* per annum for each schoolmaster, and then the net annual

proceeds

1819.

King and
others.Hudson
and others.

proceeds shall be applied for the endowment of the said two schools as aforesaid."

Jervis and *Simons*, for the plaintiffs, insisted, that this bequest was a devise of money &c. to be laid out in land within the 9th of *Geo. II.*, ch. 36; for that the word "recommend," used in the will, was imperative upon the trustees, and created a trust which must be executed; and that principle was fully established in *Pierson v. Garnet* (a). In *Malim v. Keighley* (b), it was decided, that the word "recommend" indicated desire, and was even stronger than the word "request," and that it excluded discretion. They also submitted, that words *apparently* giving trustees a discretion to lay out the money in land or not, would not protect a bequest from the operation of the statute of Mortmain, as was decided in the case of *Grievor v. Case* (c), where the bequest was of 600*l.* to be laid out in lands &c. and till an eligible purchase could be made to be placed out at interest, which was held to be void, on the ground that it was a devise of land, because the trustees must have laid out the money in land. And they cited further *Chapman v. Brown* (d), and the *Attorney-General v. Davies* (e), with the other cases therein referred to, as additional authorities to the same effect. The case of *Grimmett v. Grimmett*, which they assumed would

(a) 2 Bro. C. C. 38.

1 Ves. jun. 548.

(b) 2 Ves. 333. 529.

(d) 6 Ves. 404.

(c) 4 Bro. C. C. 67, and

(e) 9 Ves. 535.

be relied on by the defendants, they submitted, had been subsequently over-ruled by the cases of *English v. Ord* (a), *Grieves v. Case*, and other subsequent decisions.

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 King's Bench
 and others
 v.
 Haynes
 and others.

Friday,
 23d April.

Martin and *Lynch*, for the trustees, and *Raithby* for the Attorney-General, contended, that the word "recommend," as used in the present bill, was not imperative, but that the testator obviously meant to give his trustees a discretionary power, for that in this case there existed a distinction from all those cited, the testator having first given the residue of his personal estate absolutely to the charity: then he recommends them, in the way of advice, to lay out the money to be collected in land, for the benefit of the charity; but he does not thereby imperatively impose on them a duty to discharge in so doing, or in effect create a positive trust, which must necessarily be executed: and whenever trustees may, by exercising a discretionary power given to them by their testator, (and which very slight words would give them) preserve the charity from the effect of the statute, the courts have always supported the bequest, on the principle laid down by Lord *Hardwicke* in the cases of *Soresby v. Hollins* (b), and *Grimmett v. Grimmett* (c). In the latter case the Lord Chancellor's words are, "where there is sufficient room for the Court to say there is a discretionary power in the trustees to lay the money out one way or

(a) Highmore on Charitable Uses, p. 82.

(b) Burn's Eccl. L. 556.

(c) Amb. 210.

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other, either in the funds or lands, I have determined such a devise to be good," and that decision has never yet been over-ruled. Here the recommendation was not mandatory, and its adoption rested wholly with the trustees.

They submitted, that in all cases where words of recommendation had been determined to create a trust, the trusts held to be created were lawful, and such as might legally be raised; whereas here, there was a discretion given to elect one of two trusts, the one lawful, the other unlawful; and in such a case the executors might reject the one, and adopt the other. They further urged that the laying out the money in lands would in this case be a void condition, and yet the gift would be good, because it would be a condition subsequent, and being illegal, need not be performed; *Co. Lit.* 206 b. As to the cases cited on the construction of the word "recommend," they submitted that although the case of *Cunliffe v. Cunliffe*, and those upon which the decision there was founded, had been somewhat opposed by the other decisions, yet they were still subsisting authorities, and entitled to respect; and in a case like the present, differing as it did in so many important circumstances from all others, might fairly be cited in aid of the general principle on which the defendants relied.

Jervis having replied, the Lord Chief Baron took time to look into the cases.

Adv. vult.

RICHARDS,

RICHARDS, *Lord Chief Baron*, now delivered judgment (having stated the objects of the bill) as follows: The money out on mortgage being the personal estate of the testator, belongs to his next of kin clearly, if not otherwise disposed of by his will. Then the question for the Court is, whether this bequest of the residue is void under the statute of the 9th of *Geo. II.* ch. 36. On the one hand, it is contended, that the money is given to be laid out in land at all events, in which case it would certainly be void. On the other, it is said, that it lies in the option of the trustees, whether it shall be so laid out or not, if so, the bequest would then as clearly be good. Now that entirely depends on the construction of the will — (his Lordship read the words of the first part of the bequest, as far as the recommendation,) — So far no doubt the disposition to the charity is quite complete, and no further directions were in fact necessary to give it effect. The will, however, proceeds thus — (here his Lordship read the words of the recommendation) — Upon these words the whole question arises, and it depends on whether they are mandatory upon the trustees, so that they must in all events lay out the money given in land, or whether they may not so lay it out, if they should not think it advisable. If they are obliged so to lay out the money, the bequest would be void certainly; if, on the other hand, an option has been given to the executors, it is hardly necessary to say that they may legally give effect to the bequest. That was so decided by Lord *Hardwicke*,

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wicke, in the case of *Soresby v. Hollins* (a), and afterwards in the case of *Grimmett v. Grimmett*. At that time there was a much greater inclination manifested by the Courts to support such charities than subsequently prevailed, for Lord *Northington*, or rather Sir *Thomas Clark*, soon afterwards broke through the rule of Lord *Hardwicke*, for in the case of *English v. Ord* (b), he first doubted the propriety of the decision in *Grimmett v. Grimmett*. Then in the *Attorney-General v. Tyndall* (c), Lord *Northington* seems to have disapproved of that case, as did afterwards Lord Commissioner *Eyre* and the other Commissioners, in *Grieves v. Case*. With the greatest veneration for the name of Lord *Hardwicke*, I confess it is difficult to say that an election was given to the trustees in that case; but it is a strong decision, and establishes, that where an option is given, the bequest may take effect. But his Lordship there says, "It was said, the rule of construction is the same now as it was before the statute of Mortmain. That is true. But suppose the trustees in this case would not act, the trust would devolve on the Court, and I would order the money to be placed in the funds, and not invested in lands. Sir *Joseph Jekyl* always did so before the statute." So that it appears he considered that the statute, by making a charity incapable of taking lands, made no difference in the rule of construction, and I am willing to proceed upon that proposition. Then the question will

(a) Barn's Eccl. 556.

(c) Ambli. 614.

(b) Highmore on Char. Uses, 82.

be, whether in this case any power of election has been given to the trustees.* The older cases of those which have been before considered, as to the trustees having an election, appear to have turned on their being authorized to judge of the eligibility of the purchases of land to be made by them, which might enable them indirectly to decline to purchase altogether; but the later decisions, and particularly that of *English v. Ord*, have gone on the principle that a bequest of personalty until land could be purchased, or an eligible purchase made (*Grieves v. Case*) is directory and not discretionary. In this case the testator recommends that his money shall be laid out in land. Now, if in ordinary cases not at all relating to charities the word "recommend" has been held to be equivalent to a command, and to raise a trust (and there are many cases wherein that expression has been determined to be imperative on executors) I cannot so distinguish this bequest to a charitable use, as to avoid the effect of those decisions. In *Pierson v. Garnet* the terms of the bequest are very strong; the testator bequeaths the residue of his personal property to *Pierson*, his executors, administrators, and assigns, shewing clearly that he intended to give him something absolutely, yet Lord *Kenyon* held that the subsequent words, "*it is my dying request*," that if the legatee should die without issue living, he

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* His Lordship had observed, during the argument, that he much doubted whether Courts of Equity had considered the effect of the word "recommend" in Sir *J. Jekyl's* time, as they have since done.

should

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should make a certain specific disposition of it, were imperative, and created a trust, giving an interest which could not be disappointed; and he rejected altogether nice critical distinctions between "I recommend" and "it is my dying request;" holding that both expressions in effect, gave to words of entreaty a mandatory import; and other cases are there referred to in which similar decisions were made. In short, all the cases, excepting only that of *Cunliffe v. Cunliffe (a)*, have ruled, that in the case of executors and trustees, words of recommendation, request, or desire, are imperative, and create a trust; and the reason why it was held not to have had that effect in that case was, that the first gift was of the absolute ownership of the property, and the devisee had power to diminish it* in his life-time. His Lordship then adverted very minutely to the case of *Malim v. Keighley*, which he considered quite conclusive on this point. He observed, that it

(a) Ambl. 686.

* There is, besides, another distinction in the case of *Cunliffe v. Cunliffe*, even as shortly reported in *Ambler*, which takes it still further out of the principle on which the decisions in the conflicting cases proceeded, but it does not appear to have been adverted to in the reported arguments. There were in that case two annuities, one of them of considerable amount, charged on the property, bequeathed to *Cunliffe*; whereas, in *Pierson v. Garnet*, although there were annuities charged, the bequest to *Pierson* was expressly after the death of the annuitants; and in *Malim v. Keighley*, there was no charge upon the bequest. In *Frogmorton, dem. Bramstone v. Holyday (a)*, the Court held, that a charge upon a devise would give a fee, although there were no words of inheritance, *a fortiori* in a doubtful disposition of personal property it may be taken to have the effect of making absolute a gift which the words of recommendation might otherwise render conditional.

(a) 3 Bur. 1618.

WAS

was impossible to read the sentiments delivered by that incomparable Judge, Lord *Alvanley*, without perceiving the infinite pains which he took to arrive at just conclusions. His words are, adopting the opinion of Lord *Kenyon*—"I will lay down the rule as broad as this; wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shews clearly that his desire expressed is to be controuled by the party, and that he shall have an option to defeat it. The word 'recommend' proves desire, and does not prove discretion." In this case the word "recommend" comes precisely within that rule. As to the convenient time expressed in the recommendation, that means merely on a proper opportunity. Let us suppose that this was a bill filed by an heir at law, upon the recommendation to lay out money in freehold land at a convenient time, could any one doubt that the heir would be entitled to take the money as land? It is quite clear that he would. I do not consider that it makes any difference, that in this case the legatee happens to be a charity. This bequest is, within all the cases, clearly an express trust, and one which must be executed. Lord *Alvanley* says, in the case of *Malim v. Keighley*, "if a testator shews his desire that a thing shall be done unless there are plain express words, or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust." Now are there any such express words in this will as have the effect of leaving to the trustees a discretion? I certainly see none, and therefore think

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think the plaintiff has succeeded in this suit*.
 His Lordship then pronounced the following

DECREE.

Declare that the bequests in the will of *Richard Dickenson*, the testator in the pleadings named, both as to the money of the said testator, out at interest on mortgage, as also of the residue of his personal estate to charitable uses, as in the will mentioned, are void under the statute; and that such money on mortgage, and residue belong to the next of kin of the testator—with the usual directions—costs up to the hearing to be paid by the executors out of the assets—subsequent costs, and further directions, reserved.

* His Lordship afterwards added, that if he were inclined to criticise the word "recommend," it might be carried to a great extent, amounting to a command, unless where the party were an entire stranger: and that it was much the safest course to abide by the plain words.

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IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, LORD CHIEF BARON.

1813.2a 251 *Lord Eldon 24/18ca 381.*
 BOWMAKER v. MOORE, SHIRREFF, and TRELFs.

Monday,
 10th May.
 21st & 23d
 April.

3m 4g 263 1542 922 2 *Helm 642.*
 THIS cause was heard finally on the merits before the Lord Chief Baron at the last Sittings after Term.

Where the defendant in an action of replevin entered into an agreement with the plaintiff to refer to arbitration a prior action of replevin between them, and then entered and standing for trial at the assizes, and also other matters in dispute between them, but not the second replevin suit: — and that all proceedings should in the mean time be stayed till the award should be made, and which was stipulated to be published by a future certain time, but afterwards further enlarged by the plaintiff and defendant, all without the concurrence or privity of the surety in the replevin bond,

Martin and *Tinney*, for the plaintiff, contended generally, that the defendant *Moore*, by having entered into the arrangement with *Shirreff* noticed particularly in the judgment hereafter, had discharged the plaintiff, *Shirreff*'s surety in the replevin bond, by placing him in a different situation from what he would otherwise have stood in if the proceedings had not been so stayed. The arguments and authorities relied on were in substance the same as on the former occasion, when the question was discussed on the original motion (a), on the decision of which they now mainly relied; and they cited, as an additional case on the part of the plaintiff, *The Bank of Ireland v. Beresford* (b). They urged, that the ground of the decision on the motion, in the case of *Moore*

v. *Bow-*(a) *Ante*, vol. iii. p. 214.

(b) 6 Dow. Rep. D. P. 233.

whereby, in point of fact, the suit was delayed, and the surety placed in a different situation by the delay which might have been prejudicial to him, whether it actually turn out to have been so or not—held to affect the conscience of the defendant in equity; and therefore the Court granted a perpetual injunction to restrain him from proceeding against the surety, on an assignment of the replevin bond, obtained upon a return of eloignment.

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v. *Bowmaker* (a) in the *Common Pleas*, and on the demurrer, was not founded in fact, as the surety had sustained an injury by the delay; and it had not occurred to the Court of *Common Pleas* that a bill would lie in equity to compel the landlord to proceed with the suit under the circumstances of this case.

Jervis and *Roupell* for the defendant *Moore*, insisted, as the principal point in their case, that the plaintiff was not placed in a worse situation by any part of the arrangement which had taken place between the parties, because they contended that the defendant *Moore* could not, under the circumstances, have obtained judgment in the action before *Michaelmas* Term, when he became entitled to judgment by virtue of the cognovit: and that all that had been done must necessarily have operated in favour of the plaintiff as surety in the bond, and could not in any respect prejudice him.

The *Lord Chief Baron* having stated that he should consider the case before he delivered judgment, observed, that he was of opinion that the determination of this case on the former motion was right; and that there were several propositions in the case in the *Common Pleas*, as reported, to which he could not assent; and particularly that which assumed it to be necessary that the surety should be damnified by the change effected in his situation, before he could be considered to be dis-

(a) 2 Marsh. 81 and 392, and 6 Taunt. 379, S. C.

charged,

charged; for that it would be quite sufficient to discharge him, that he *might possibly be injured* by the change.

Cur. adv. vult.

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RICHARDS, *Lord Chief Baron*, now delivered judgment:—

There have been already two decisions on the points in this case in different Courts, and certainly the judgment of the Court of *Common Pleas* (a) is quite at variance with that of this Court (b). It is very extraordinary that the determination in the *Common Pleas* was not cited or adverted to when the matter was argued on the original motion for this injunction, which the Court of *Exchequer* thought proper to grant.

[Here his Lordship stated the case very fully.]

The question now before us is really therefore in effect, whether under the circumstances of this case (which are certainly very peculiar, and such as I have never met with before) the Court of *Common Pleas* have determined rightly in deciding that at the time when the action was brought in that Court the present defendant, the plaintiff at law, had a right so to proceed against the complainant in this suit.

(a) *Moore v. Bowmaker*, 2d Marshall, 81 and 392, and 6 Taunt. 379.

(b) *Ante*, vol. iii. p. 214.

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and
TELF.

Now it is most material to observe, that even at common law, it was always the duty of the party who sued the replevin to *prosecute* his suit, and the sheriff ought to take pledges of prosecution (a). At length, by the statute of *Westminster* 2. (13 *Edw.* I. c. 2. s. 3.) it was provided, that sheriffs should, from thenceforth, not only receive of the plaintiffs pledges for the pursuing of the suit, but also for return of the beasts if return should be awarded. Then by the 11th of *Geo.* II. c. 19. s. 23. sheriffs were empowered and required, in every replevin of a distress for rent, to take in their own names from the plaintiff, and two responsible persons as sureties, a bond, in double the value of the goods distrained, conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained in case a return should be awarded, before any deliverance be made of the distress.

The suit so to be prosecuted, as we all well know, is carried on in the first stages in the Sheriff's Court, and may be determined in the inferior court; but that is now so very seldom done, if ever, in practice, that I cannot attach any consideration of importance to the fact of the cause having been removed by the defendant, for it being almost a mere formality and of course, so to remove such actions by the writ of *accedas ad curiam*, it can have no effect in determining this case. The

(a) F. N. B. 68.


cause was certainly removed in point of fact, and it is said by mistake, and through forgetfulness of the engagement. The course is, on the removal of the cause, that the parties must begin again in the superior Court, and declare *de novo*, and the declaration must be delivered by the plaintiff, or if he do not deliver it in due time, the defendant may sue out a writ *de retorno habendo*. It should also be observed, that it is clearly a local action in whatever place the beasts or goods may have been taken, or to whatever place they may be afterwards driven or removed.

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 and
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The material facts of this case are, (and the dates are very important to be attended to) that *Shirreff* occupied a farm of *Moore's* as his tenant, under an agreement entered into between them on the 13th *July*, 1810; that afterwards the rent becoming in arrear the plaintiff, on the 3d of *February*, 1814, executed a replevin bond to the Steward of the Liberty of *Bury St. Edmunds*, as co-surety with another person (the defendant *Trelfs*) for the return of the goods of *Shirreff*, the defendant *Moore's* tenant, which he had distrained on the 19th *January*, 1814. The bond contained the usual condition. There was at that time another prior replevin cause pending between the same parties, which stood ready to be tried at the then ensuing *Spring* assizes for *Suffolk*, having been in due time entered for trial. On the 23d of *March*, the defendant *Moore* entered into an agreement with his tenant (without the consent or knowledge of the plaintiff in the present suit) to refer matters in

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dispute between them to arbitration, the tenant (the defendant in the action, on the replevin bond) giving him at the same time as part of the arrangement a cognovit in the first replevin suit, authorizing him to enter up judgment of *non pros*, unless he should pay the rent, for which the first distress was made by the first day of *Michaelmas* Term following. Under these circumstances they entered into that agreement of the 23d of *March*, and its terms are very material. They are, that all differences then subsisting between *Shirreff* and *Moore*, touching the following matters, that is to say, the construction of the agreement of the 13th *July*, as to the time of payment of the rent, and the covenant of the defendant *Moore*, the landlord, to keep the buildings in repair, which he was charged with having broken, should be referred to arbitrators, whose award was to be conclusive, and to be made on or before the 23d of *May* then next, or such further time as they should require, not exceeding the 24th of the next *June* (and that limitation of time it is very important to keep in mind) the costs of the replevin and of the reference to be in the discretion of the arbitrators. Then they are directed as to what particular subject-matters they are to proceed to arbitrate upon, &c. and then comes a clause providing that they shall have power to arbitrate on the matters aforesaid only, and none others then depending between the parties. The agreement then concludes with a clause, that nothing therein contained shall be construed so as to prejudice the distress made by

Moore

Moore on the 19th of *January*, 1814, (the second distress) or to discharge the sureties of the defendant *Shirreff* in the replevying of such distress. And pending the reference, it is agreed (which is a very material part) that no proceedings shall be taken in the action of replevin upon such distress. The agreement therefore notices the second distress now in question, but that was not then ready for trial, nor were any proceedings had in the Steward's Court.

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The bond entered into by the plaintiff was in the usual form. The award we have seen was originally to have been made by the 23d of *May*, or some other day not exceeding the 24th day of *June*; but the parties, without the privity of the plaintiff, enlarged the time till the 10th of *July*, 1814. *Moore* removed the plaint on the 24th of *April* into the Court of *Common Pleas*; he did therefore proceed pending the reference; but as he admits that it was by mistake, that proceeding must be considered as not having taken place. On the 7th of *July* the award was made. Then, on the 20th of *August* following, the defendant *Shirreff* confessed the second action of replevin, but judgment was not to be entered up till the first day of the following *Michaelmas* Term. The rent not being paid in the mean time, the defendant *Moore*, having entered up judgment in the former action, and levied on the tenant *Shirreff*'s goods for his whole demand, afterwards entered up judgment also on the confession in the second action of replevin; and the High Steward of the Liberty having re-

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and
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turned an *eloignement* to the writ of *retorno habendo*, Moore procured an assignment of the bond, and brought the present action against the plaintiff, and he then filed this bill, on the ground that he was discharged from his obligation as surety for *Shirreff* in consequence of what had taken place, as has been already stated between *Moore* and him without his privity, on the equity that the plaintiff was thereby placed in a different situation from that in which he would have been if the arrangement made between the litigating parties had not taken place, and that such arrangement might have operated to the plaintiff's disadvantage.

It certainly appears that the Court of *Common Pleas* thought that that circumstance was no objection to the action against the plaintiff; but they admitted the law to be, that if by any arrangement entered into between the obligee and the principal, the surety would be placed in a different and disadvantageous situation, it would have the effect of discharging him by virtue of the rule originally adopted from the courts of Equity, but now considered to be established law, as it must be held to be in every Court in *Westminster Hall*. The question was again brought before the Court of *Common Pleas*, by demurrer, on which occasion they seem to have considered that the rule could not operate in this case as in that of bail; because the sureties in a replevin cannot, like bail, at all times interpose in the suit, and because the sureties in this case had not been in point of fact prejudiced by the delay.

The

The same question afterwards in an application for an injunction came before this Court upon the same facts, and the then Lord Chief Baron whose great patience of investigation and learning we all well remember, was clearly of opinion that the injunction ought to be granted to restrain the action under the circumstances then disclosed, on the ground of the tenant being prevented by the act of the landlord from doing that for which his surety undertook. I much lament that the Court of *Common Pleas* was not upon either occasion apprized of that decision in this Court.


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TRELFORD.

Several points have been suggested in argument against the plaintiff's equity. It has been said, that if the judgment confessed in the second action of replevin, were by collusion, and a fraud upon the surety, that would have been a ground for setting it aside. There does not however appear to have been any fraud; for none is proved. The cognovit, on the contrary, did not accelerate the judgment, nor did it give the defendant in the replevin more than his due; and the sureties having no controul over the action against their principal, could not do any thing in it.

The real and only question in the case is, whether the surety was, in point of fact, placed in a different situation, by what had taken place on the arrangement between the principal and the obligee, and whether by such change of situation he *might have been prejudiced*, not whether he did in fact actually sustain any injury in consequence.

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 and
 TOWERS.

A creditor taking a surety is bound to notice the nature of his engagement, and to protect him. The surety is entitled to every advantage which the principal would have had under any circumstances. Then has this agreement to refer these disputes any such effect? The object of that reference was certainly confined to the first replevin, but it reached the second in its consequences. The allowances claimed by *Shirreff* might have lessened what was due to *Moore* on the second distress. The surety might be benefited by proceeding according to the condition of the bond, but could not be injured. The award too was originally to have been made by the 24th of *June*, and if it had been then made the situation of the surety might not have been altered by the agreement. There is a stipulation that nothing in the agreement shall prejudice the distress of the 19th of *January*, but *if it might* have such an effect, that alone would be sufficient in equity to discharge the surety, and by last clause of the agreement no proceedings were to be taken in the action of replevin upon the distress. It was urged for the defendant that he is not the obligee of the bond; that there was no privity between him and the plaintiff; and that nothing which passed between the defendant and *Shirreff* could affect him; but I think, that although there was no direct privity between them, for the present purpose it amounted to the same thing, and that he was in substance the obligee, as he would have a right to an assignment of the bond if the condition were broken, and the sureties were intended for his benefit and protection, and they are so considered at law. One object of the
 bond

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BOWMAKER
v.
MOORE,
SHIRREFF,
and
TRELF.

bond was, the due prosecution of the proceedings, and they were stayed by the act of *Moore*. When *Bowmaker* entered into the bond, it was probably on the faith of the implied contract, that the proceedings should not be delayed, and he might have calculated on his principal continuing solvent for a given time, during which there would be no risk. If so, a procrastination might have been extremely injurious to his interests, and that was a very probable consequence of *Moore's* agreement with *Shirreff*. Yet *Moore* stipulates for a delay which might indeed benefit *Shirreff*, but not his surety, whose benefit *Moore* was also obliged to regard, and he might say *non hæc in fœdera veni*. I am not at liberty in such a case to enquire whether any inconvenience did actually arise to the plaintiff in consequence of the agreement between *Moore* and *Shirreff*; for if the plaintiff was discharged by any thing which took place between them, he was discharged *at the time when the agreement was entered into between them*. The defendant in the replevin suit could not have moved till the 24th of *June* by the terms of the agreement. At that time even, however, he might perhaps have proceeded to trial at the ensuing *Summer* assizes; and if he had so proceeded I might have felt more difficulty in the case; but the time for making the award was afterwards enlarged by *Moore* till the 10th of *July*, when the Term was over, and no trial could be had till the next *Spring*. There was therefore, in fact, a difference made in the situation of the surety by the delay occasioned by the arrangement between the principal and the obligee, and whenever that be
the

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HOWMAKER

v.
MOORE,
SHIRREFF,
and
THELPS.

the case, and the surety may possibly be prejudiced by such delay and change of situation, it is my opinion, whether right or wrong, that it affects the conscience of the obligee, and operates to discharge the surety. I must therefore decree

A perpetual injunction.

I cannot in this case give costs.

Wednesday,
12th May.

HEWITT, Gent. v. FERNELEY.

The Court will not stay the *postea* in the hands of the associate, for the purpose of having an attorney's bill on which an action has been brought, and a verdict recovered, referred for taxation, and to be endorsed according to the *allocatur*, where the Jury expressly found a "verdict for the plaintiff for the amount of his bills, subject to taxation."

They discharged a rule which had been obtained to shew cause why such an application should not be granted with costs.

JERVIS, on a former day, had obtained a rule on behalf of the defendant, calling on the plaintiff to shew cause why his bills of costs should not be referred to be taxed, the *postea* to remain in the hands of the associate in the mean time, and to be endorsed according to the Master's *allocatur*—proceedings to be stayed. He obtained the rule on an affidavit, stating, that the present action had been brought for the recovering of 576*l.* 7*s.* 11*d.* the amount of certain bills of costs delivered by the plaintiff to the defendant, for business done; that the defendant objected to three of them to the amount of 334*l.* 17*s.* 6*d.* and that on the trial the Jury returned the following verdict by their foreman, "We find for the plaintiff for his bills, *subject to taxation.*"

The affidavit added, that no investigation, as to the correctness of the charges, took place in Court, the

the Lord Chief Baron having ruled that that could not be done on the trial.

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 HAWKINS
 &
 FENNELLY.

Parke now shewed cause. An attorney may bring an action for the recovery of his bill of costs before taxation, the only preliminary required by the statute (a) being, that he deliver his bill signed a month before; but the act has not required that it should be previously taxed. It is laid down in *Tidd* (b) to be the rule, and the cases have established it, that an attorney's bill cannot be taxed on the trial of an action brought upon it, nor after verdict—*Williams v. Frith* (c), *Hooper v. Till* and *Wife* (d), *Clarke v. Taylor* (e): and the reason is obvious, because the attorney being obliged by the act, to deliver his bill a month before the action, the defendant is precluded if he do not procure it to be taxed in the mean time, *Anderson, administrator, v. May* (f).

On the point of the special finding, he submitted that the Court always rejected conditions annexed by Juries to a verdict for a sum certain, as in the case of *Taylor v. Willes* (g), where, on *non assumpsit*, the verdict was for 39*l.* 6*s.* 8*d.* "if by law it may be," the Court held, that what was found after the amount of damages was void.

Jervis, in support of the rule, contended, that the verdict must be taken as found; in this case

(a) 2 Geo. II. ch. 23. s. 23.

(e) *Barnes*, 124.

(b) Page 324, (6th ed.)

(f) 2 Bos. & Pull. 237.

(c) *Douglas*, 198.

(g) *Cro. Car.* 219.

(d) *Ib.* 199.

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v.
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the special finding being quite consistent with law, whereas in the case cited it was not. Had the verdict been for the amount of the plaintiff's bills, without that qualification, the defendant might perhaps have been bound, but that he would not admit; because, in the case which had been cited from *Douglas*, judgment had been suffered by default, but there is no authority establishing that such a qualified verdict, delivered on a trial, may not be taken, and it ought to be abided by. In effect, it was nothing more than the common case of a verdict passing for a plaintiff, subject to a reference. To have referred the bill before would have admitted a liability.

RICHARDS, Lord Chief Baron.—We are of opinion that it would not be safe to grant this application after verdict. We should be giving a defendant an opportunity of taking his chance of a trial, and afterwards permitting him to come to the Court to reduce the *quantum* found. There is nothing in the distinction of the decisions cited having been verdicts on judgments by default: or if there were any, it would rather operate against the argument; because a verdict after trial is of a higher and more conclusive nature.

GRAHAM, Baron.—I am clearly of the same opinion; there should certainly be every possible check imposed on the conduct of attornies; for the courts in which they practice are in some degree responsible for their conduct; but I think with Lord *Munsfield*, that when a verdict has once established

established the client's liability, it would be dangerous so to qualify it as is now attempted,

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WOOD, Baron.—I am also of the same opinion; it would be attended with most mischievous consequences if we should grant this motion. We have no authority so to change a verdict.

GARROW, Baron.—The law is sufficiently jealous of the conduct of professional men, and has provided many wholesome regulations as checks upon their conduct, but we are not to carry that jealousy so far as to say we will not allow them the benefit of a verdict found for them by a Jury. I consider that a verdict so found is not less conclusive than a judgment by default.

Per Curiam.

Rule discharged, with costs*.

* An affidavit was put in, denying the terms of the special finding; but the Court, as it appears, did not proceed upon that.

1819.

Wednesday,
12th May.

THE KING v. HARVEY.

On an immediate Extent in Chief.

The Court will not grant a new writ of extent of the date of a former tested several years before (between 8 and 9 in this case) on the ground that the defendant has been since found to have been further indebted to the Crown, and to have had at the time of issuing the first extent, property not then known to belong to him, and though his goods and chattels seized and sold under that writ, produced only so much as would satisfy but a very small part of the Crown's original debt.

But a new writ of present teste should be issued, which may be done at any time on application to a Baron, where, while the Crown debt be unsatisfied, the defendant becomes possessed of newly-acquired property.

CLARKE moved for an order for leave to issue a new writ of extent of a former teste (the 28th November, 1810) on an affidavit, stating the issue the writ of that date for the sum of 900*l.* due from the defendant to the King, for the amount of property duty and assessed taxes, received by him from the parish of which he was collector; that on the 4th of January, 1811, an inquisition was held, finding the defendant possessed of certain goods and chattels of the value of 200*l.* 15*s.* which the sheriff seized; that after the issuing of the extent it was discovered that a further sum of 883*l.* was also due from the defendant to the Crown, which still remained unpaid; and that since the holding the inquisition, it had been ascertained that the defendant, at the time of issuing the extent, was interested in certain leasehold estates, which had not been seized into the King's hands.

It was suggested that the motion had for object. the over-reaching a fraudulent conveyance.

But the Court refused the application; for that it would be attended with very mischievous consequences if the Court should grant such an order; as it would have the effect of bringing before a

Jury

Jury all the circumstances relating to the transfer of the property after so long a period, to the probable prejudice of *bonâ fide* purchasers,

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 The KING
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On application being then made for a writ of the present date, they said that that would be granted of course out of Court by a Baron; for while the King's debt remained unsatisfied, a new extent might at any time be had without motion, if the defendant should subsequently have acquired any other property.

Nil.

JARDINE v. HAYES and BONNEY.

Saturday,
 15th May.


AN injunction was moved for on an affidavit, made by the plaintiff's attorney, which stated that the defendants having recovered a verdict for damages, on which they had entered up judgment, and had brought actions against the bail;—that a bill was filed on the 28th of *April* last, in this Court, for an injunction to restrain further proceedings in the actions both against the principal and the bail;—that on the 13th of this instant, *May*, the deponent applied to the defendant's attorney in the actions at law, and tendered him a subpoena, and enquired of him, if he would appear for the defendant *Bonney*, when he said that he had received no instructions to appear, and therefore should not;—and that he

also

The affidavit of service of subpoena on a bill filed for obtaining an injunction, to stay process at law, in this Court, served on the attorney of the plaintiff at law, must state positively that neither the attorney nor his client knew where to find the defendant, nor where he might be served with the process, or it will be considered insufficient on a motion for that purpose, however full it may be in all other respects.

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JARDINE
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also refused to inform the deponent where the said defendant was to be found, or whether he knew him personally or not.

The Court refused the motion, because the affidavit was insufficient, in not stating, as the practice of this Court requires, that neither the deponent nor his client knew where the plaintiff was to be met with, nor where he might be served with the subpoena.

Nil.

IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, LORD CHIEF BARON.

1819.

Monday,
10th May.GRAY'S-INN
HALL,
13th and 14th
January.EXCHEQUER
CHAMBER,
3d and 4th Feb.

NOEL and others v. Lord HENLEY and others.

1 Coll. 430.

5H4 N 273

see 2 Chap. 248.


THE plaintiffs, who were beneficially interested under the will of the late Lord *Wentworth*, filed

Devise of testator's real estates in A., derived from the

bounty of a collateral branch of his family to trustees upon trust to sell, to pay off two mortgages on another real estate inherited from his ancestors in B. and devised by his will in strict settlement—and to pay to his wife 5000*l.* in part satisfaction of 10,000*l.* secured to her by their marriage settlement out of certain trust funds—and to pay a legacy of 3000*l.* to a legatee, one of the present plaintiffs, (he being also one of the devisees of the residue of the money to arise by the sale of the said real estate), as soon as sufficient monies should have arisen by the said sale, and after satisfaction of the payments in the will before directed to be made thereout, the legacy to carry interest from the testator's death—and also to pay such part of such other of his just debts and of the other pecuniary legacies by him thereafter given and bequeathed, or which he should give or bequeath, as his personal estate not thereafter specifically bequeathed and the personal estate bequeathed to him from the same source as the first mentioned real estate, should not extend to pay and satisfy;—and after such payment to invest the same in government securities in their (the trustees) names, in trust to pay the dividends in a certain prescribed manner for the benefit of the plaintiffs and their families:—and, after giving various other pecuniary legacies, he directed that all the legacies given by him should be paid in full, without any deduction for the legacy duty, and (where no time had been mentioned for their payment) within twelve calendar months—he then gave all the residue of his personal estate to his wife whom he appointed executrix, and he made the trustees executors of his will—the testator's wife died in his life-time:

Held, that the trust, for the payment of those particular debts and legacies out of the real estate devised to be sold, was not a general exemption of the personal estate to the extent of their amount, in all events; but that it was only a partial exemption, on behalf of the person to whom he had bequeathed the residue (his wife): and that that bequest having lapsed, the residue of the personal estate was no longer exonerated in favour of the next of kin, but had again become chargeable with all the burthens, to which personalty is primarily liable, viz. the personal and proper debts of the testator, and legacies not otherwise provided for—once more exonerating the devised estate, in favour of the trust on behalf of the residuary legatees.

It was therefore declared that the mortgage on the estate in B. should be paid off out of the personalty, and that the other (which was an incumbrance on the derivative estate in A. before it became the testator's property) should be paid out of the produce of that estate: that the 5000*l.* which had lapsed was not a resulting trust for the benefit of the heir-at-law, but was (as well as the payment of the mortgage debt which was not originally the proper debt of the testator) a simple charge on the devised estate, which might be discharged by the devisees: and that it was not obligatory on the trustees to sell the devised estates absolutely in the first instance.

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 and others
 v.
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 and others.

the present bill against the trustees under the will—the heirs at law—and the next of kin of the testator, for the purpose of obtaining a declaration of the trusts, and a decree for their being carried into execution.

The bill charged, that the testator by his will (dated 8th *June*, 1815) had devised to trustees (the defendants, Lord *Henley* and Sir *J. B. Burgess*) all his real and personal property, the first of which consisted of two distinct estates, and which, for the sake of distinction, may be called shortly his *Leicestershire* estate, and his *Rowney* estate, the former being his own estate of inheritance (and which he had devised by his will in strict settlement), and the latter derived to him from the *Rowney* family. That latter estate he had by his will devised to the trustees upon the trusts in question, as follows:—as to such of
 his

Real estate being devised in trust to sell at such time or times after the testator's decease, as should seem most advisable, either together or in separate parcels, by auction or private contract—the trustees to stand possessed of the produce of the sale, and the rents and profits accruing in the mean time upon the trusts of the devise.—Held not to invest the trustees with an unqualified discretion in respect of the sale, or to entitle them to retain the accumulation of the mesne rents and profits to answer the exigencies of the will; but that the residuary *cestuis que* trust were entitled to receive their respective proportions of the accruing rents and profits from the end of the year after the death of the testator, on the principle of the rule laid down in the case of *Sitwell v. Barnard*: the words “as should seem most advisable,” being held to be equivalent to the phrase, “with all convenient speed.”

A legacy bequeathed to be paid out of the rents and profits, and the produce of sale of a real estate devised to be sold for the payment of such legacy *inter alia* being in a subsequent part of the will directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty.—Held, that the duty on that particular legacy must be paid out of the same fund, and not out of the personality, the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund.

Practice.

If the testator's personality be clearly more than sufficient for payment of the debts, legacies, funeral, and other expences, &c. so that there be no occasion to resort to the produce of the estate devised to be sold for the purpose of creating a subsidiary fund for the exigencies of the will, the Court will proceed to decree execution of the trusts in exoneration of the fund, without waiting for a final report, which would, in strictness, be necessary, or until all the devised property should be sold.

his real estates as he had power to dispose of under the marriage settlement, or will, or as the heir at law of *Thomas Rowney*—in trust to sell, at such time or times after his (the testator's) decease as should seem most advisable; either together or in separate parcels, and at one or several times, &c., either by public auction and sale, or by private contract, as should appear most advantageous: and they the said trustees were to stand possessed of the monies to arise therefrom, and of the rents and profits in the mean time upon the following trusts:

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 and others
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 and others.


First, to pay off a sum of 2000*l.*, charged on some part of the said estates, and which sum was a charge upon the *Rowney* estate by mortgage before it became the property of the testator;—2dly, to pay off a sum of 20,000*l.*, described by the will, to be then due and owing and secured to *Mary* the widow of Lord *R. Manners*, by mortgage of part of the testator's *Leicestershire* estate, and all interest thereon up to the time of payment;—and, 3dly, to pay the sum of 5000*l.* to the testator's wife, in part satisfaction of 10,000*l.* secured to her by their marriage settlement out of certain trust funds: and the sum of 3000*l.* to the plaintiff *Noel* (both to be paid as soon as sufficient monies should have arisen by the said sale, and after satisfaction of the former payments therein before directed to be made thereout, and to carry interest from the testator's death), and also to pay such part of such other of his just debts, and of the other pecuniary legacies

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and others.

gacies by him therein after given and bequeathed, or which he should give or bequeath, as his personal estate not therein after specifically bequeathed and the personal estate of the said *Thomas Rowney* should not extend to pay and satisfy. And, after such payments, the trustees were directed to invest the residue in government securities, in their names, in trust to pay the dividends and annual proceeds of one moiety thereof to the plaintiff *Noel* for life, and after his decease to pay his wife an annuity of 200*l.*, and transfer the said moiety to his children, to vest when they should become of age or marry, subject nevertheless to the appointment or will of *Noel*, with other especial directions as to the manner of such children taking. And as to the other moiety (and also the first mentioned moiety, if there should be no children of *Noel* to take it), to pay the dividends to such persons as the plaintiff *Anna Catherina*, the wife of the plaintiff *Biscoe*, should appoint; or in default thereof to her own use; and after her death to pay the moiety to her children, subject to an annuity to *Biscoe*, in nearly the same way as the other moiety had been directed to be paid to the children of *Noel*, excepting only their eldest son, who was excluded from any share; and in case there should be no children living of either, the whole of the residue to arise by such sale was, *with all convenient speed*, to be laid out and invested by the said trustees in the purchase of freehold estates in fee, in *England*, as near as possible to the testator's other estates, to be settled to the same uses, and upon the same trusts

trusts as the testator's *Leicester* and *Warwick* estates comprised in his marriage settlement, or such of them as should at that time be capable of taking effect: the produce of such stock, in the mean time, to be paid to the persons who would be entitled to the profits of the estates if purchased. Then after giving other pecuniary legacies, the testator directed that all the legacies given by him *should be paid in full, without any deduction for the legacy duty*; and all legacies in respect of the payment of which no time had been mentioned, were directed to be paid within twelve calendar months. He then gave all the rest and residue of his personal estate and effects whatsoever, which should exceed the payment of his debts, *not otherwise provided for*, legacies, funeral, and testamentary expences, to his wife; and he appointed her and his trustees executrix and executors of his will.

1819.

 NOML
 and others
 v.
 Lord HENLEY
 and others.

The bill then stated, that the testator died in *April*, 1815, having survived his wife, leaving certain of the defendants his next of kin—that his personal estate was, exclusive of such parts thereof as had been specifically bequeathed, more than sufficient for the payment of all his debts, and for which the real estates were not made the primary fund, his funeral and testamentary expences, and his pecuniary legacies, and the residuary bequests of the purchase-money arising from the sale of the real estates given in moieties as aforesaid—that the plaintiff *Noel* had six children between the ages of sixteen and four years;

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and othersLord Hewley
and others.

and *Catherina Biscoe* had nine children, besides her eldest son, two of whom (daughters) had attained the age of twenty-one years, and the rest were infants from sixteen to four years old.

The plaintiffs then charged, that it was the duty of the executors to proceed to sell the lands, and perform the trusts of the will—that until the sale and investment of the purchase-money, the trustees ought to pay one moiety of the rents and profits of the real estates directed to be sold, accruing from the death of the testator, to plaintiff *Noel*; and the other to plaintiff *Anna Catherina Biscoe*, after having paid thereout the interest on the charges and incumbrances thereon—that a competent part of the testator's *personal* estate ought to be appropriated and applied in payment of the legacy duty, attaching upon *the residuary bequest* of the purchase-money to the plaintiffs and their children; but that the trustees acting in concert with other defendants (the testator's next of kin), had refused to do so; and that the executors declined to proceed to a sale of the said estates without the direction and authority of this Court.

The bill then having suggested that the defendants, the next of kin, pretended that the plaintiffs were not entitled to the rents and profits of the estates directed to be sold, except they should not be sold *within a reasonable period* after the testator's death—nor to call upon the *next of kin* to pay the legacy duty on the said residuary bequest

quest out of the testator's *personal* estate; but that it ought to be deducted from the said bequest—charged the contrary, and prayed a decree accordingly.

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 NORTON
 and others
 v.
 Lord Henley
 and others.

The defendants Lord *Henley* and Sir *J. B. Burgess*, by their answer, submitted the questions of the right of the parties to the judgment of the Court, and particularly whether any duty was payable on the residuary bequest under the 45th *Geo. III.*; and if so, whether that bequest were a *legacy* within the meaning of the exonerating clause of the will. They stated that they had very considerably reduced the amount of the testator's personal estate, by having made large payments to the next of kin, which had rendered it insufficient to satisfy the 2000*l.* and 20,000*l.*; and submitted that therefore it had become necessary that a sale of the estates should take place as soon as possible for their indemnity, more particularly as landed property had become considerably decreased in value: and that they ought to be permitted to retain the rents and profits until the same should be sold.

The cause came on to be heard on the 29th *April*, when

Martin and *Newland* appeared for the plaintiffs, and

Fonblanque and *Belt* for the defendants, the trustees and executors.

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Dauncey, Wingfield, Shadwell, and Lovat, for the heirs at law and next of kin.

West, for the infants interested under the will, and

Longley, for defendants to a supplemental bill.

The Court having decreed the will to be established and the trusts to be performed, referring it to the Deputy Remembrancer to make the necessary enquiries, and take the usual accounts: the Deputy Remembrancer on the 18th *December*, 1818, made his report, and the cause now came on for further directions.

January 19.

Fonblanque and Belt for the trustees, objected *in limine* that the Court could not proceed on the present report, till all the estates devised for sale should be sold; and they submitted that the only regular course was to move for leave to make a separate report, or for a reference to ascertain whether it would be proper that any part of the estates not yet sold should be sold; but on that

The *Lord Chief Baron* observed, that although the objection was a proper one on the part of the trustees, and that the course suggested would have been the more regular proceeding, he still hoped that the objection might be overcome; for, as in this case, it was quite clear that the money already brought into Court, arising from the sale
of

of such part of the estates as had been sold, was more than sufficient to pay all the incumbrances, debts, legacies, and expences (and if there were not, nothing could have been done even on a separate report); and as therefore no mischief could arise from proceeding without the final report, he would not put the parties on an objection of mere form to the inconvenience of so long a suspension of the good effects, to all the persons interested in the property, of discharging it from the burthen of debts and legacies; and there being enough in Court for that purpose, he should consider himself at liberty to order that the Deputy Remembrancer go on with the decree, which could however be suspended from time to time, on application to the Court, as often as there might be reason for it, looking only to the exigencies of the will.

1812.

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 and others
 v.
 Lord HENLEY
 and others.

Martin and *Newland* for the plaintiffs, then submitted to the Court, that the plaintiffs who were tenants for life of the trust funds, were by the express words of the will, and on the principle laid down in the case of *Sitwell v. Bernard* (a), entitled to the rents and profits of the devised estates till sale; for they contended that, from the language of the will, it was clear that the testator intended to benefit the plaintiffs *Noel* and *Anna Catherina Biscoe* very largely—that the words of the bequest shewed that the legacy of 3000*l.* was to be paid out of the general pro-

(a) 6 Ves. 520.

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NOEL
and others
v.
Lord HUNTLEY
and others;

duce of the estates, whether that were the produce of the sale, or of the rents and profits, the legacy having been declared to be intended to bear interest from the testator's death; and such interest must necessarily arise from the rents and profits. In *Sitwell v. Bernard* the rule is laid down decisively, that where a residue is given after various legacies, those legacies shall be payable at the end of a year from the death of the testator: the Chancellor there holding that convenience was to be called in to aid the construction of wills, as to the commencement of the period of enjoyment by the tenant for life;—that the beneficial enjoyment is not to be postponed by the accidental difficulties, which, in most cases, present themselves to impede the early execution of wills, and the putting the property, of whatever nature it be, into a disposable state;—and that, where that could not be done for any time, the end of the year is to be taken as the period at which it is to be rendered beneficial. There being therefore nothing in the will indicative of any intention on the part of the testator that the surplus rents and profits of the estates, devised to be sold, should accumulate to form an aggregate fund, they urged that the plaintiffs *Noel* and *Biscoe* were entitled to a proportion of the rents and profits, if not from the death of the testator, at least from the end of the year after.

Fonblanque and *Belt*: *Benyon*, *Pepys*, and *Longley*, contended, on the other hand, that the present case was distinguishable from *Sitwell v. Bernard*,

not, because there the direction was imperative that the trustees should lay out the residue, *with all convenient speed*, meaning as speedily as possible; whereas here the testator had given them a full discretion by the words at *such time or times*, and in such manner as *they should think most advantageous*; and here also they had duties to perform, which rendered it desirable that they should augment, as much as possible, the produce of the estates devised to meet those duties. They urged therefore that the plaintiffs were not entitled until an actual sale should be effected, and in the mean time the rents and profits ought to form a fund in the hands of the trustees to answer the exigencies of the will.

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and othersv.
Lord Hanmer
and others.

[*Lord Chief Baron*.—I think the words “with all convenient speed,” not in substance distinguishable from the directions given in this will.]

Martin having replied,

The *Lord Chief Baron* stated, that (without intending at present to give a final opinion on the question) he considered this case to be within the rule of *Sitwell v. Bernard*: and that it is the duty of Courts to carry into execution, as far as they can, the directions of the testator, according to what may be collected from the language of the will. The words (said his Lordship) in this devise, directing the estates to be sold “at such time or times after the testator’s decease, as to the trustees should seem most advisable,” I consider as equivalent to, “with all convenient speed,” and the

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the immediately subsequent words, do not alter the sense; they only give authority to sell either by public auction or private contract. I admit that the direction that they should stand possessed of the rents and profits until sale is strong; but the question is, whether it is strong enough to get rid of the rule as laid down in *Sitwell v. Bernard*? The Court in that case put a construction on similar words, and I hold myself bound to defer to the authority of that decision; for there should prevail an uniformity in legal determinations. The convenient rule is there laid down to be, that the beneficial enjoyment should commence at the end of the year from the death of the testator; and the Court in that case avowedly overlooked such words as those which follow here, where they were inconsistent with the testator's apparent general intention. In the case of *Gaskell v. Harman* (a), Sir William Grant took great pains to shew that the particular words of the will necessarily excluded the operation of the rule in that instance. The case of *Sitwell v. Bernard* was extremely well considered, and established—upon a review of the several authorities of *Hutcheon v. Mannington*, *Entwistle v. Markland*, and *Stuart v. Bruere*, (and indeed all the cases were there brought under consideration)—that the rule of convenience must prevail in directing the proper period for the payment of legacies; and that that is generally the end of the year. Lord Eldon, in that case observes, that the decisions of both Lord Thurlow and Lord Rosslyn as to time im-

(a) 6 Ves. 169.

pose difficulties upon him; but he agrees as to the principle: and I entirely concur with every word of Lord Eldon's judgment in that determination. At present therefore I am strongly inclined to be of opinion that the tenant for life is entitled to the rents and profits which he claims; but I will reserve my final determination till Friday,

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Martin, Benyon, Newland, West, and Longley, now submitted, that the 3000*l.* given to Noel was a legacy, and that the bequest of the residue of the produce of the sale of the *Rowney* estate was also a legacy, and that the duty on them being directed by the testator to be paid, it ought to be paid out of the personal estate, which is always to be considered the primary fund for that purpose,

Wednesday,
January 13.

Dauncey, Wingfield, Shadwell, and Lovat, for the heirs at law, who were also of the next of kin, and others of the next of kin, who were not heirs at law, contended, that the personal estate was not liable, but that the duty should be paid out of the real estate.

[The Lord Chief Baron. The legacy duty is a charge upon the legacy, not upon the estate; but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund.]

see
1 Mylne &
Keble 693.
4 699.

It was then contended, on the part of the plaintiffs,

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plaintiffs, that the principal and interest due on the mortgage of 20,000*l.* (which was originally a debt due from Lord *Wentworth*) and on that of 2000*l.* (by which the personal estate of Lord *Wentworth* had been benefited to that extent) ought to be paid out of the personal estate, and also the legacy to Mr. *Noel* of 3000*l.*: and that the bequest to Lady *Wentworth* having lapsed by her death, it should go to the persons entitled to the fund out of which it was to have been paid, and not to the next of kin as personal estate undisposed of by the will.

On the first point it was urged, that no exoneration of the personal estate was intended by the testator; or if there was, it was only a partial and particular exoneration for the benefit of the widow, the residuary legatee: and she having died before the testator, the intended exemption of the personal estate failed, which therefore would again become liable to the burthens to which by law it was subject; and the testator must be taken to have died intestate as to that: and in that respect this case was said to come within the principle of the decisions in *Pickering v. Stamford* (a), *Waring v. Ward* (b), *Hale v. Cor* (c), and *M^r Leland v. Shaw* (d); for in this will there are no words shewing any intention to throw these particular burthens on the real estate, or to make that the primary fund for the payment of the specific debts.

(a) 3 Ves. 332.

(c) 3 Bro. C. C. 322.

(b) 5 Ves. 670.

(d) 2 Sch. & Lef. 538.

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On the other hand it was insisted for the heirs at law and next of kin, that the testator intended the *Rowney* estate to be applied in all events in discharge of the 2000*l.* and the 20,000*l.*, and interest, and also of the 5000*l.* and the 3000*l.*, which are directed expressly to be paid "thereout"—that it was the residue only, *minus* all those sums, that was intended to go to the devisees—that the personal estate was, for the benefit of the next of kin, exonerated to the extent of those debts and legacies, and that it was plain from the declaration of the testator, that the residue of the personal estate of *Thomas Rowney* should be considered as his (the testator's) personal estate, and not as land:—that he intended, by the disposal of it, to augment his personal estate, and to such an intention the Courts have always given effect; for which they cited the authorities of *Williams v. The Bishop of Landaff* (a), *Hancox v. Abbey* (b), *Gray v. Minnethorpe* (c), *Burton v. Knowlton* (d), and *Brummel v. Prothero* (e), all which cases were submitted much more nearly to resemble the present than either *Waring v. Ward*, or *Hale v. Cox*; for in the former of those cases there was no exemption, and in the latter the question was not raised.

[Those cases however his Lordship distinguished as turning on the intention; whereas the present was a case of intestacy as far as regarded the question before the Court.]

(a) 1 Cox, 245.

(b) 11 Ves. 179.

(c) 3 Ves. 103.

(d) 3 Ves. 107.

(e) 7 Ibid. 121.

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As to the 5000*l.*, said to be lapsed, they contended (if not also as to the other sums charged on the real estate), that if it should be held that there was a failure of those gifts altogether, it would be a resulting trust for the benefit of the heir at law; citing *Arnold v. Chapman* (a), *Cambridge v. Rous* (b), *Hutcheson v. Hammond* (c), *Ackroyd v. Smithson* (d), and *St. Barbe Tregonwell v. Sydenham* (e).

It was besides contended, that, if the *Rowney* estate should not produce money enough to pay the mortgages, the legacies given out of that fund could not have been demanded out of the personalty: and, on the other hand, the gift of 5000*l.* having lapsed, the residuary devisee could not take that as part of the residue; and therefore that proportion, at least, of the whole of the real fund, if it might be so called, must go to the heir at law, as being an undevisee part of the real estate.

It was also much urged, that it appeared on the face of the will that the testator meant not only a benefit to his widow by increasing his personal residue out of the *Rowney* estate, but also to the takers of the *Leicestershire* estate, and whomsoever should be entitled to the residue of his personalty.

(a) 1 Ves. sen. 108.

(b) 8 Ves. 25.

(c) 3 Bro. C. C. 128.

(d) Bro. C. C. 503.

(e) 3 Dow Rep. D. P. 194.

Martin,

Martin, in reply, denied that any supposed intention of the testator could be used in aid of the heirs at law and next of kin, who, if they had any claim at all, could only derive it from an intestacy; and therefore he submitted that the cases cited for the defendants did not apply, as they all turned on questions of intention; and it would be absurd to say that any testamentary disposition could be designed by the testator to meet the event of an intestacy. He contended, besides, that the *Rowney* estate was meant by the testator to form a subsidiary fund in aid of the personalty, and that the *Leicestershire* estate might be exonerated, and the general residue augmented, for the benefit wholly of the residuary legatee—that the takers of the produce of the sale of the *Rowney* estate were to be regarded as the *hæredes facti* of the testator—that the debts and legacies directed to be paid out of it were not to be considered as to be raised absolutely, and at all events; but that they should be held to be a charge upon the estates for the benefit of the creditors and legatees: and he cited *Stapleton v. Colville* (a), *Lord Inchiquin v. French* (b), and *M^cLeland v. Shaw* (c)—submitting that that difference would distinguish this case from that of *Ackroyd v. Smithson*, and that class of cases where the direction was absolute and positive to sell the estate, at all events, in which case there would (he admitted) be a resulting trust for the benefit of

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(a) Ca. Temp. Talb. 202.

(c) 2 Sch. & Lef. 538.

(b) Amb. 38.

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the heir at law. Here it is not imperative on the trustees to convert the real estate into money, as long as they have a fund out of which the debts and legacies may be readily satisfied; and they are in this case the executors also. Lady *Wentworth* being dead, it stands as if the bequest to her had been intended to discharge a debt at his death which he afterwards paid in his life-time; and the reason for raising the 5000*l.*, and for augmenting the residue by exemption of the personalty then ceased: and nothing but the most manifest intention or express direction can exonerate personal estate from payment of debts. He therefore submitted, that the plaintiffs were entitled to the declaration prayed by the bill.

The *Lord Chief Baron*, at the close of the argument, said, he should take time to look into the cases, and he spoke in high terms of approbation of the case of *Ackroyd v. Smithson*, as argued by the present Lord Chancellor; but he distinguished the present case by considering the debts and legacies directed by the will to be paid out of the *Rowney* estate as a mere charge on that part of the testator's real property in aid of the personalty. Were it otherwise (said his Lordship), all debts which a testator should think proper to cast on any part of his real estate, which his personalty might not be sufficient to pay, would create so many trusts for the benefit of the heir at law.

On the other point, his Lordship stated his then impression to be, that, as there could be no doubt
that

that the primary fund for the payment of debts and legacies was the personalty; if a testator should give his residuary personal estate to a legatee discharged by means of his real estate of debts, and that bequest should lapse, the bounty intended would be taken away, and the testator must be considered as dying intestate as to that: not that the residuary clause is expunged; for it still forms part of the will and the probate, and may be resorted to, to explain the intention of the testator; but the estate is, according to the determination in *Waring v. Ward*, discharged from the exemption. Here (said his Lordship) the estate is not given to be sold absolutely, for the express purpose of paying a debt, which is not to be paid by any other means. It is given to create a fund by sale for certain purposes, and the costs of the sale are to be paid, which of course would be saved if the estate were not sold. There can be no doubt, from reading the will, that the testator meant that some of his debts should be paid out of his personal estate, though it is difficult to say what or why. The words are, the debts not therein otherwise provided for; now they are all in fact previously provided for: or if it should be said that that expression alludes to the provision for payment of the 2000*l.* and 20,000*l.* out of the *Rowney* estate, that would go to make him admit, that if he had not so far exonerated his personal estate, they were debts which would have been chargeable on the personal estate.

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The *Lord Chief Baron* now delivered judgment.—The questions on the points remaining in this cause to be decided are, whether the personal estate is exonerated from the payment of debts and legacies, or of any of the debts or legacies; and particularly, whether the sums directed to be raised out of the estate, in certain events, and for certain purposes, are to be considered as descending, if I may use the expression, to the heir at law,—or whether, speaking in the language of Equity, they become a part of the residue of the real estate devised to the plaintiffs? These questions must depend upon a strict attention to the language of the will. (His Lordship then stated very particularly the various property disposed of by the will, and the manner and terms of the disposition, observing that the testator had emphatically expressed his intention to be, that all the *Rowney* property, whether real or personal, was to be treated as personal estate, and he observed also, that the 2000*l.* mortgage could not be considered in strictness as the testator's own proper debt, whatever liability in equity to pay it he might have subjected himself to by his covenant.)

As to the devise of the *Rowney* estate, his Lordship observed, that the testator appeared to have intended it to be applied in aid of his personal estate, if the personal estate should not be sufficient to pay all the charges created by the will.

Now,

Now, there is certainly here, continued his Lordship, no general exoneration. Beyond all question, it is a bequest of the residue of the personal estate and effects, after payment of such debts as are not by the will otherwise provided for, legacies, funeral and testamentary expences. There might have been a bequest to the residuary legatee, of the residue of the personal estate, without any such reference to the debts not provided for; but certainly it was not a general exoneration: and it is besides quite clear, that it was a bequest intended wholly for her benefit. The personal estate must be considered as liable in the first instance, and that not because a testator intends that it should be liable, for it is liable by law though there were no such intention, as much as if he had said I wish it to be so first applied. No expression of intention is necessary, any more than in the case of an heir at law, whom it is not necessary to shew was intended to take the inheritance. The personal estate is liable to the payment of debts and legacies, unless there is a clear intention expressed by the testator to discharge it from that liability. Here there is no such intention expressed. Then the wife being dead, the person for whose benefit the bequest was intended is gone, and there is no legatee to take it. In the construction therefore of this will, her name must be expunged, and then it comes within the principle of the case of *Waring v. Ward*. There was not in that case an intention to exonerate the personal estate generally,

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and the legatee intended to be favoured having died, it was held, that the fund otherwise exonerated was to be applied exactly as if nothing had been said respecting the application of it. If so, then, whatever the real intention of the testator was, judging as I must from the effect of the words of the will, and looking through it from one end to the other, I see no general exemption even *intended*. I see none but a personal exemption, and that is gone, there being no person to take advantage of it, and therefore the testator must be considered as having died without having given his personal estate in any particular manner. Debts and legacies stand upon a very different footing, because debts are to be paid *primâ facie* out of the personal estate. Legacies may be paid out of the personal estate, or out of the real estate, according to the intention of the testator; therefore such legacies as are not thrown upon the real estate, are to be paid out of the personal estate; but as to those which are thrown upon the personal estate, an account must be taken to ascertain if that fund is sufficient for their discharge, an account being first taken of the debts which were due, that is, of such as are to be considered as due, from Lord *Wentworth* himself, and the personal estate must be applied to the discharge of those debts.

With respect to those legacies which are thrown upon the real estate only, he declares that the *Rowney* estate shall be applied to the discharge of the legacies after mentioned, so that
the

the legacies before mentioned do not therefore seem to have been thrown upon the personal estate, but are confined to the real estate.

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On the words, "after payment of debts, legacies, and funeral expences," I must observe, that the legacies here are general, and would have been thrown upon the personal estate beyond doubt, but that, on referring back to the passage where the testator speaks of "the legacies thereafter given and bequeathed," it is obvious that they must be thrown upon the real estate. If we could ascertain that the 20,000*l.* was Lord *Wentworth's* own debt, of course the personal estate must go to pay it; but I think, upon looking into my notes, that it can hardly be considered as a debt which was to have been paid out of his personal estate, that is, in the arrangement to be made between the personal and real estate.

With respect to the legacy of 5000*l.* given to Lady *Wentworth*, that cannot be raised for her, and it has therefore become a question how far that legacy is to be thrown into the lap of the heir at law. Now, allow for a moment that the 20,000*l.* must be considered as forming a debt of Lord *Wentworth* in the way we are considering it, distinguishing the two estates, it does seem to me that this is nothing more than a charge upon the real estate. If I once establish this proposition, that the personal estate is first to be applied for the payment of that debt of 20,000*l.* then the whole of that is provided for, and the real estate is given,

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as it appears to me, for the benefit of the devisee, subject to the payment of such debts as the personal estate may be insufficient to pay. If the personal estate is not sufficient to pay debts, or any part of them, they must be satisfied out of the real estate. It is the ordinary case of personal estate given to *A.* and real estate to *B.* subject to the payment of such debts as the personal estate is not sufficient to satisfy. So much as is not wanted to pay the debts not satisfied *aliunde*, must go to the devisee, and whether you enumerate particular debts, or whether the charge is general, it seems to me to be the same thing in effect.

I am of opinion, therefore, that the arrangement which should be made must be an application of the personal estate to pay the debts of Lord *Wentworth*, and then the real estate must be sold; and what remains, after what is necessary to go in aid of the personal estate, must go to the devisee. I cannot draw any distinction between a direction to sell, to pay particular debts, and a charge, and whether it is to be sold out and out for the payment of the debts or in aid, it seems to be the same thing.

With respect to the 5000*l.* legacy to Lady *Wentworth*, if it can be called a legacy, which I much doubt, that, whatever it was, is excluded out of the personal estate; that therefore must be considered as directed to be raised out of the real estate, and payable out of it, supposing she had lived. With respect to the legacy to Mr.

Noel

Noel of 3000*l.* that seems to stand under the same circumstances, for though he is living, and ready to receive it, it is given out of the real estate, upon which it is thrown, and is not to be taken out of the personal estate.

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I acknowledge that I have had very considerable doubts and difficulties in this case. I have looked through all the authorities, but find that none immediately apply to this case. If there is any doubt upon the state of facts, it can be referred to the Master, but I am very desirous to avoid delay, if possible.

THE DECREE.

Let the Deputy Remembrancer's report be varied &c. and absolutely confirmed.

Declare, that the net amount of the rents and profits of the testator's devised real estate, which accrued due between the day of his death (17th *April*, 1815), and the 17th *April*, 1816 (making all usual allowances thereout), shall be made principal money, and be added to and form an aggregate fund, with the principal monies produced by sale of the said estate. Declare the plaintiff, *Noel*, to be entitled for his life to one moiety of the clear rents and profits of said devised estates, accruing between said 17th *April*, 1816, and the letting the purchasers into possession, and also to one moiety of the interest and dividends

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dends of the stock bought with purchase-money; and Mr. *Biscoe* to the other moiety: the trustees to pay the balance in their hands of the rents and profits of the devised estates to plaintiffs, in equal moieties, first retaining the legacy duty thereon:— Declare *the sum of 2000l.* (the mortgaged debt to *Haworth*), directed to be paid out of the monies to arise by the sale of the said real (the *Rowney*) estates, and all interest due at the time of the testator's death (but not the interest accruing during the first year after the testator's death, which was decreed to be paid out of the rents and profits of the estates accruing during that period), and also the legacy of 3000*l.* to *Noel*, with interest from time of testator's death, and the legacy duty of 10*l. per cent.*, to be raised and paid out of any of the monies produced by the sale of the said testator's said real estate:— the principal sum of 20,000*l.*, mortgage debt, to *Lady R. Manners*, and all interest, to be paid out of the testator's personal estate not specifically bequeathed; if insufficient, the deficiency to be supplied out of the produce of the sale of the said devised estates:—declare that the 5000*l.* given to *Lady Wentworth* is not a resulting trust for the heirs at law of the testator, and ought not to be raised and paid to them, but that the same ought to sink for the benefit of the several persons entitled to the said devised estates:—and, the testator having declared that the surplus and residue of the personal estate of his uncle *Thomas Rowney*, should, from the time of his (testator's) decease, be considered as part of his personal estate,

estate, and not as land, nor to be laid out in land, be it so declared and applied by his executors in payment of his debts and legacies:—the duty on the clear residue of the money to be from the sale of the devised estates, to be paid out of such residue.

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— v. SOWERBY and others.

— v. WOOD and others.

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Thursday,
13th May.

THE above causes having been heard, now came on for judgment.—Their discussion was in effect nothing more than a rehearing of the cause of *Byam v. Booth* and others, reported in Vol. II. of these Reports, p. 231.—The plaintiff in that cause, Dr. *Byam*, having died at *Brussels* the day before the judgment of the Court was pronounced, the decree remained registered only in the Minute Book. The present plaintiff was soon afterwards inducted into the vicarage of *Catterick*; and he filed this bill in *Easter Term* 1817 against the defendants, owners and occupiers of lands in the parish, praying an account and description of the sheep not producing wool and lambs, and of the horses and other dry, barren, and unprofitable cattle, which had been agisted on their lands in the parish.

An old grant from the Crown, "of grain, hay, and herbage," not shewn to have been acted upon, and under which no enjoyment or perception of the specific tithe claimed (agistment) was proved—held not to be sufficient proof of a title, in persons claiming under the grantee, to the tithe of agistment.—*Wood, B. dissentiente.*

"Herbage," held not to mean agistment.

If a vicar claiming an account of

tithes throughout a whole parish, *by bill in equity*, prove his right in part of the parish only, the objection that the claim is too largely laid, is not a ground for dismissing the bill.—*Wood, B. dissentiente.*

The

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The evidence being the same as on the former occasion, and there being nothing new advanced in argument, every instructive purpose of this case will be answered by giving such parts only of the several judgments which were pronounced by the Court, as add to the authority, or the reasons of that decision. The Barons delivered their opinions *seriatim*, as before.

GARROW, *Baron*, expressed himself as so entirely concurring in the opinion of the majority of the Court as pronounced by them on the former occasion, and for the same reasons, that it would be sufficient if he should read the judgment delivered by the then *Lord Chief Baron*, whose patience and learning he highly eulogized, as affording a lucid exposition of the opinion which he had himself formed on the question in this cause. His Lordship having then stated in substance the reasons which are to be found in that judgment, concluded by declaring that opinion to be, that the plaintiff had clearly made out his title to the tithe of agistment, of which he now claimed an account, and which was the only matter now in dispute; and that the defendants had not offered any good defence either in fact or in law: and that therefore the vicar was entitled to a decree.

WOOD, *Baron*, again declared himself to be of the same opinion as before, on all the points in the case; and his Lordship entered into the reasons on which that opinion was founded, as fully as he has done on the former occasion, and which
 were

were in substance the same; and he also cited the same authorities. The only new matter which his Lordship introduced, was, in speaking of the manner of laying the claim on the part of the vicar, which, as before, he condemned, as having been laid too largely and extensively; for (said he, in allusion perhaps to what fell from Lord Chief Baron *Thomson* on the former determination) it is not sufficient in a case where a plaintiff, by the fraud and artifice of laying his claim more extendedly than his right, for the purpose of excluding adverse testimony, that he may have to pay costs for the excess, because it would in all cases be well worth while for a party, at the expence of some addition to his costs, to establish a right which he would but for that device not have been successful in setting up; and the establishment of such claims in courts of Law and Equity, observed his Lordship, go down to after times as indisputable memorial of title, and therefore should be regarded with jealousy on every occasion, without reference to the immediate consequences of so minor an inconvenience. That he denied to be the doctrine of any Court of law, whatever might be the practice which had obtained in the Court of Chancery; and he would reject the admissions at the bar which should be made as to the propriety of such a mode of pleading; for the rules of pleading should be uniformly founded on the same principles in every Court in the kingdom.

GRAHAM, *Baron*, adhered to the judgment delivered by him on the hearing of the cause of

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*Byam v. Booth*, and, in support of his reasoning, his Lordship investigated very minutely, and commented fully on the various and numerous documents adduced in evidence in the cause. Amongst other observations, he disclaimed the authority of the ancient grants produced on the part of one of the defendants, and which were not shewn to have been acted upon, or followed up in any instance; for, in cases of this sort, he had always considered that non-exercise of his rights by a grantee, made his grant as a matter of evidence mere waste parchment. Without proof of enjoyment, of what avail would these deeds be on an issue? There would be nothing to try if an issue should be granted, and it would be dangerous to mislead a jury by sending an issue to them, which might induce them to think that we had considered these dormant grants, which have never been followed up by perception, as being sufficient ground for their finding a verdict in their favor.

On the other points, his Lordship held, as before — that a grant of the tithe of herbage would not convey the tithe of agistment — and that the vicar, having claimed tithe of a larger proportion of district than that to the tithe of which he had proved his title, (although in this case the learned Baron declared it to be his opinion that here the plaintiff had proved his whole case) was no ground for the dismissal of his bill.

RICHARDS, *Lord Chief Baron*, commenced by observing, that the present suit was, in the result,  
a clear

a clear re-hearing of the former cause, as there was nothing new in the evidence, or any of the circumstances, although the defence, as he was sorry to see, was in some respects different, in having resisted the plaintiff's claim to some of the tithes, which had before been properly admitted; and therefore he should also take the same judicious course as had been pursued by Mr. Baron *Garrow*, in merely saying that he concurred with the majority of the Court in the opinions delivered by them on the former decision.

His Lordship, however, stated, that in consideration of the habits of his professional course of life, he felt it incumbent on him to make a few remarks on the objection which had been taken to the manner in which this claim had been laid, and the extent to which it had been set up; although, said his Lordship, it may not be necessary, on the present occasion, where the majority of the Court are of opinion that the plaintiff has completely established his general title to *agistment* throughout the parish, whatever he might have done upon the former occasion. That right is the foundation of the present claim, and such is the right demanded *upon this record*. If the defendant *Crowe* has not made out the case on which he and those claiming under him have affected to rely — is that a reason why this bill should be dismissed altogether as to the other defendants *and him*? But suppose he had succeeded in his defence, is the vicar to be therefore beaten by *all* the rest? It is quite clear, that in Courts of Equity the

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the principle of the objection is not recognized in their rules of pleading, and therefore the Counsel who have admitted the objection to be untenable, would have acted improperly if they had hesitated to do so; for such an objection, I venture to assert, was never made in a Court of Equity, till the case of *Byam v. Booth*. The reason is quite obvious. The whole of the cause in a Court of Equity is in the breast of the Judge, and the entire controul of the Court. A vicar, the moment he establishes his right, is *quatenus* rector; and if *Crowe* had pleaded that he was exempt from the tithe demanded for one-half of his lands, and liable for the other, could a Court of Equity have dismissed the vicar's bill *in toto*, notwithstanding it reached that proportion of the claim which the defendant was *in consciencie* clearly bound to pay?

As to the ground of objection, that such a manner of laying the claim might be made to operate to defeat a defendant's case upon the trial of an issue, Equity provides for that also by requiring the Judge to indorse the *postea* agreeably to the facts proved in the case, and the Court will then take care that no injury or injustice shall be done. There is, therefore, no foundation for saying that any injury or injustice may be done by the exclusion of evidence. In a Court of Equity nothing is ever suffered to come upon a party by surprise, and on this part of the case, the inhabitants of the parish would be good witnesses, because they are not interested between the rector and vicar.

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I have stated thus much upon the objection which has been taken; because, from the course of my professional experience, I feel myself called on to give my opinion in an especial manner, and that I am bound to justify the very proper admissions of counsel, that the mode of pleading, which has been adopted by the plaintiff, is conformable with the law and practice of Courts of Equity.

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The Court, therefore, decreed, in each of the causes,

An account of the tithe of agistment,

With costs\*.

\* On the 18th of *June* following, the defendants presented petitions of appeal against the above decree to the House of Lords; but they afterwards abandoned their appeal, and paid the plaintiff his costs.



1819.

OTLEY, Widow, Administratrix, &c. v. LINES  
and others.Friday,  
21st May.

Demurrer.

General demurrer—to a bill filed by a judgment creditor against his debtor (who had been discharged under the Insolvent Act (53 Geo. III.)) and the executrix of a will, by which he (the debtor) was entitled to a share of the residue of the testator's personal property, praying an injunction against the executrix to restrain her from paying it over to the legatee, and that the plaintiff might be paid his debt thereout—allowed.

THE plaintiff filed this bill for a discovery and for relief; praying an injunction to restrain the defendant, an executrix, from paying over to *John Bindley*, the other defendant, his share of the residue of her testator's personal estate bequeathed to him; and that she might be ordered to pay thereout the debt due to the plaintiff from the legatee.

The bill (having shewn the defendant *Bindley* entitled under the will of the testator, who died in *October*, 1818, in which month the will was proved) stated, that in the year 1816 *Bindley* was discharged under the then existing Insolvent Act, being at that time indebted to the plaintiff's deceased husband, on a judgment recovered a considerable time before, and in other sums—that the plaintiff, as administratrix of her husband, had taken all such means as were furnished by law to obtain payment of the debt out of the effects of which the insolvent had become possessed since his discharge: and insisted that she was entitled to the prayer of her bill.

The defendants demurred (generally) to the bill; for that any discovery would be of no avail, and that the plaintiff was not entitled to any relief.

*Wakefield,*

*Wakefield*, in support of the demurrer, submitted, that if the plaintiff had shewn any equity to entitle her to the interposition of the Court, in granting the prayer of the bill, it should have been filed on behalf of herself and all the other creditors of *Bindley*; but he contended, that it was altogether a case in which a Court of Equity could not act; and that whatever right a creditor might have against the future effects of his debtor, discharged by virtue of the Insolvent Act, it must, according to the 10th and 14th sections of the Act, on which alone this bill could be founded, be pursued in the Insolvent Debtors' Court.

1819.  
  
 OTLEY  
 v.  
 LINES  
 and others.

*Martin* and *Cooper* for the plaintiff, relied upon the doctrine in *Mitford's* Treatise on Equity Pleading, p. 90 to 93, that Courts of Equity may interfere where Courts of Law cannot, from accident or fraud, give a party a complete remedy, or where their remedies may be defeated, or the effect of them fails. The words of the learned author of that Treatise are, "Where an act of parliament has expressly given a right, the Courts of ordinary jurisdiction have been found incompetent to give in all cases a full and complete remedy, and the Courts of Equity have therefore interposed. Thus, in the case of a person, who had been discharged under an act for relief of insolvent debtors, by which his future effects were made liable to the demand of his creditors, but his person was protected, the Court of Chancery, exercising its extraordinary jurisdiction, enforced a judgment of a Court of Common Law

1819.  
  
 OTLEY  
 v.  
 LYNES  
 and others.

against his effects, which were so circumstanced as not to be liable to execution at common law.

They also cited the case of *Edgell v. Hayward* and *Dawe (a)*, as establishing that such a bill as the present might be maintained: and that it might be filed by a single creditor on his own behalf, and upon that authority they submitted that this demurrer ought to be over-ruled.

RICHARDS, *Chief Baron*.—The act of parliament has been brought into discussion by this bill very unnecessarily and improperly; as nothing is stated on this record to ground any application to the Court, or to assimilate the plaintiff's case to that of *Edgell v. Hayward*. That was a case of very particular circumstances; whereas this is simply a bill filed by a creditor against his debtor. Lord *Hardwicke* considered that a case of the first impression, and he relieved on the ground that the plaintiff there was precluded by the statute from proceeding to outlawry, and could do nothing without the assistance of the Court; and I do not find that that case has ever since been acted upon. Nothing of that sort is made to appear by this bill, and we cannot act upon any thing which is not put upon the record. This is a bill filed by the plaintiff against his debtor and his debtor's trustee, the executrix of the will; but the plaintiff sets up no sort of claim or lien to entitle her to the interposition of the Court,

and we should be doing very wrong if we were to suffer such an experiment to succeed in such a case.

1819.  
  
 OTLEY  
 v.  
 LINES  
 and others.

Whatever therefore might be the result of another bill making out a stronger case, the present bill must fail, and this demurrer be allowed.

GRAHAM, *Baron*.—This is certainly a case of the first impression. I own the determination of the case of *Edgell v. Hayward* very much surprised me, and I consider it as at least a very strong measure. I never recollect an instance of that decision having been followed as an authority in a Court of Equity in point of practice by the adoption of a proceeding so exceedingly strong. The authority of Lord *Hardwicke* is nevertheless very great, and any case founded upon it requires some answer. Now that which arises upon the present bill is, that a sufficient case is not stated to bring the plaintiff within the equity of that decision. To entitle a party to the interference of the Court, it should appear distinctly on the face of the bill, that he was precluded from all possible legal remedy. Now, looking at this act of parliament, it is clear the plaintiff had a very obvious remedy *aliunde*.

WOOD and GARROW, *Barons*, were of the same opinion,

Demurrer allowed.

1819.

Saturday,  
22d May.

KING v. TEALE and another.

An instrument in possession of a defendant, which is material to both the plaintiff's and the defendant's case, and is inquired of, in certain respects, by the plaintiff's bill filed to restrain proceedings at law on it, must not be set out more at length in the defendant's answer than is sufficient fairly to satisfy the plaintiff's interrogatory, or it will be subject to be referred for impertinence.

THE plaintiff had obtained an order for referring the defendant's answer to the Deputy Remembrancer for impertinence in having set out *at too full length*, though it was not set out to nearly its extent, a warrant of attorney to confess judgment and the defeasance, as to which the plaintiff had interrogated him by the bill which was filed for a reference to the Master to take an account of what was due upon the warrant of attorney; and for an injunction from proceeding at law upon it in the mean time. The officer having certified that the answer contained nothing impertinent, his certificate was now excepted to, in respect of the objection taken.

*Wakefield*, in support of the exception, cited a MS. case from the Court of Chancery of *Slack v. Evans*\* (M. T. 1819); and he submitted, that if

344090402 \* SLACK v. EVANS, In CHANCERY, M. T. 1819.

10a & Ph 269

In that case the Lord Chancellor, on occasion of a motion for a special reference to the Master, to tax the costs of a prolix schedule, which had been reported to be pertinent, said,

The true question is, whether a case can exist in which a Master can report the answer to be pertinent; but that he cannot do justice without a special reference being made to him to inquire into some prolixity not impertinent. For this, no authority is cited; and if I decide with the Master, I must decide

if the defendant had admitted by his answer that the warrant of attorney in question was to the purport and effect charged by the bill, it would have been sufficient; or that he might have pointed out shortly in what respects it was different.

1819.  
  
 KING,  
 v.  
 TRALE  
 and another.

*Martin* and *Duckworth*, on the other hand, contended, that in a defendant's answer, put in on oath, it was only consistent with due caution, that he should not take upon himself to set out the tenor and effect of a material document, and particularly where, as in the present case, the instrument differed very essentially in its date, in the number of instalments by which the money was to be paid, and other important matters; and they asserted, that although the instrument appeared to run to some length in the answer, yet not one tenth part of the whole was set out, and

decide that this prolixity is not impertinent, which I should be very reluctant to do. If in an examination, the examinant sets forth tradesmens' bills at length, it is impertinent. If pertinence and impertinence be so mixed that they cannot be separated, the whole is impertinent. So a prolix setting forth of pertinent matter is impertinent.\*

Counsel do not see the schedules in one instance in an hundred;\* although frequently more important for them to see than the body of the answer itself.

Needless prolixity is itself impertinence, although the matter should be relevant.

\* See Beames' Orders in Chancery, p. 70, where causeless multiplication of words is classed amongst other impertinences: and so in p. 165.

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KING

v.

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and another.

its contents were material, not only to the case of the plaintiff, but to that of the defendant.

*Per Curiam.*

All that is required in an answer is, that the defendant should fairly and pertinently set forth as much of what instrument or other document he may be asked respecting, as is sufficient to satisfy the object and inquiry of the plaintiff's charge and interrogatory; and he must not wantonly incumber the record beyond that, so as unnecessarily to harrass and increase the expence and difficulties of the plaintiff. He is bound to set out the full purport and effect so far; but it is not proper that he should do more. If he does, it must be at the risk of a reference for impertinence. We are of opinion that the defendant has transgressed that rule in this respect, and therefore the exception must be

Allowed,

## IN THE EXCHEQUER CHAMBER.

IN ERROR.

3864 N 479

DOE, on the Demise of the Earl of JERSEY and  
others v. SMITH and others.

1819.

Saturday,  
22d May.

J. M. &amp; W. 692.

ON the trial of this action of ejectment at the  
Summer Assizes for *Hereford*, in 1815, before

Mr.

Lease—by ten-  
nant for life,  
under a deed  
of settlement  
on marriage,  
giving him a  
power to de-

mise the lands &c. for lives, or years determinable on lives, upon certain conditions, one of which was in these words, "And so as there be contained in every such lease a power of re-entry FOR non-payment of the rent thereby to be reserved:" immediately after the covenant by the lessees for payment of the rent, was inserted the following proviso, "Provided always, that, if it shall happen (&c.) that the said yearly rent (duties &c.) hereby reserved, or any part thereof, shall be behind, unpaid or undone, in part or in all, BY THE SPACE OF FIFTEEN DAYS next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done or performed as aforesaid; AND NO SUFFICIENT DISTRESS OR DISTRESSES CAN OR MAY BE HAD AND TAKEN upon the said premises, whereby the same and all arrearages thereof (if any be) may be fully raised, levied, and paid (&c.) it shall and may be lawful to and for (the tenant for life) his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised (&c.) wholly to re-enter &c.:"—held, in an action of ejectment by the reversioner against the lessees, to be VALID—on the ground that the above proviso, contained in the lease for re-entry, was conformable with the power to demise contained in the deed of settlement; and satisfied the particular condition in question, on which it was to be exercised: and that the lease was therefore a good execution of the power to demise, which was held to be general, and such as authorized the lessor to annex in the fair and *bona fide* exercise of a due discretion, reasonable and legal qualifications to the power of re-entry for non-payment of the rent reserved: and did not require the tenant for life to exact an absolute unqualified right to have an immediate power to re-enter on the expiration of the day on which the rent reserved should be made payable.

Both of the above qualifications are legal and reasonable, and may be annexed to a power of re-entry for non-payment of rent required by an indefinite leasing power to be contained in leases to be made under it, to temper the rigor of such a right, where the requisition in such leasing power is general in its terms, or does not expressly prohibit their introduction without being a departure from the exigency of the power.

If a power to demise refer to "such ancient and accustomed, or as great and beneficial rents, duties, and services, as had formerly been reserved" (&c.); or if from its general tenor it may be collected that the creator of the power intended that the maker of the leases should have regard to the state of the property during former occupations, the form and covenants of such previous leases may be taken as a guide by the lessor in framing new leases, and the contents of the former may be received in evidence on a question,



1819.

Doz, dem.  
 Earl JERSEY  
 and others  
 v.  
 SMITH  
 and others.

Mr. Baron *Wood*, the jury found the facts stated in the special verdict, the substance and material parts of which are set out below. The Court of *King's Bench* (Ld. *Ellenborough*, C.J.; and *Bayley* J. only giving any opinion, *Holroyd* and *Abbott* J.J. having been of counsel with the parties), on that statement of facts, gave judgment for the defendant:\* thereby deciding, that the lease granted to the defendant, on the validity of which he relied, was warranted by the terms of the settlement giving a power to the defendants' lessor (the tenant for life) to make such leases—or (in other words) that the lessor had complied with the requisition of the settlor, that there should be contained in all such leases a power of re-entry for non-payment of the rent reserved, by the terms of the proviso for re-entry introduced therein immediately after the covenant on the part of the lessees for the payment of the rent &c. *post*, p. 291; and upon that determination the lessors of the plaintiff brought the present writ of error.

The special verdict found (as far as is materially applicable to the questions raised upon the facts of this case), that Lady *Louisa Barbara Mansel*,

\* That judgment is inserted in a note, *post*, p. 296.

question, as to whether the power were well executed, affecting the validity of such new leases, to shew that they were framed in the same terms as those of the old leases.

Long established forms and precedents of common assurances adopted in general and approved practice by conveyancers of acknowledged professional skill, are of great authority, in the absence of decided cases, in the determination of questions which regard the validity of the various legal instruments by means of which the disposition of real property is usually effected.

only

only child and heir at law of Lord *Mansel* at the time of his death (29th of *November*, 1750), became seised in her demesne as of freehold, for the term of her natural life, of the demised premises, part of certain freehold estates in the counties of *Brecon* and *Glamorgan*, which had been devised to her by his will for her life with divers remainders over—that the will contained a power enabling her, in consideration of marriage, to revoke all the uses and devises therein, and to make a new appointment of the fee-simple thereof unto such uses, and with such powers and provisoes, and in such manner as was by her afterwards done by her marriage settlement of the 2d of *July*, 1757—that on the 20th of the same month she intermarried with *George Venables Vernon* the younger, afterwards Lord *Vernon*—that, while she was so seised (for life, with such power of appointment over in fee), before and in consideration of her marriage, she duly executed, according to the power given her by the will, a deed of settlement of the said lands &c. whereby, after revoking and annulling the uses of the will, she appointed, settled, and limited the devised estates to trustees; To hold (after the solemnization of the intended marriage) to the use of the said *George Venables Vernon* the younger, and his assigns, for and during the term of his life, without impeachment of, or for any manner of waste; and after his decease to the use of herself for life *sans* waste: and after the determination of those estates by forfeiture or otherwise in their life-time, or the life-time of the survivor of them, to the use of the same trustees and their heirs during &c.

in

1819.

DOE, dem.  
Earl JERSEY  
and others  
v.  
SMITH  
and others.

The uses of  
the deed of  
settlement.

1819.

Doz, dem.  
 Earl JERSEY  
 and others  
 v.  
 SMITH  
 and others.

in trust to preserve &c. (permitting the said tenant for life to take the rents and profits); and after the decease of the survivor to divers other uses for the benefit of the issue of the marriage, and also of the issue of Lady *Mansel*; and in default of such issue to the use of such person, and for such estates, as she should, whether sole or covert, and notwithstanding her coverture, by her will direct, limit, or appoint; and in default of and until such appointment &c. &c. (in the usual form and words), and subject thereto to the use of herself, her heirs and assigns, for ever.

The verdict then found that by the same deed it was provided, declared and agreed, between the said parties to the deed of settlement, in the words following:

The words of the first (or first part of the) leasing power for lives or years, determinable on lives, on which the principal question arose.

“ Provided (&c.) that it shall and may be law-  
 “ ful to and for the said *George Venables Vernon*  
 “ and *Louisa Barbara Mansel* his intended wife,  
 “ from time to time, during their respective lives,  
 “ when, and as they shall respectively be in pos-  
 “ session of or entitled to the perception of the  
 “ rents and profits of the manors, messuages, lands,  
 “ hereditaments, and premises, so limited to them  
 “ for their respective lives as aforesaid, by inden-  
 “ ture or indentures under their respective hands  
 “ and seals, attested &c., to demise, lease or grant,  
 “ such part or parts of the said manors, messu-  
 “ ages, lands, tenements and hereditaments, or  
 “ parts or shares of manors, messuages, lands,  
 “ tenements, hereditaments and premises whereof  
 “ they

“ they shall be so respectively in possession or  
 “ entitled to the perception of the rents and  
 “ profits as aforesaid, as are now leased for life  
 “ or lives, or for years determinable on the drop-  
 “ ping of a life or lives, to any person or persons  
 “ *in possession or reversion* for one, two, or three  
 “ lives, or for any number of years, determin-  
 “ able on the dropping of one, two, or three  
 “ lives; so as there be not on any part or parcel  
 “ of the same premises to be demised, leased, or  
 “ granted respectively for a life or lives or for  
 “ years, determinable on the dropping of a life  
 “ or lives, as before mentioned, any greater estate  
 “ or interest subsisting at any one time than what  
 “ will wear out or be determinable on the drop-  
 “ ping of three lives: and *so as* on every respec-  
 “ tive lease, demise or grant for a life or lives,  
 “ or for years determinable on the dropping of  
 “ a life or lives *there be reserved* and made  
 “ payable during the continuance of the estates  
 “ and interests thereby to be demised, leased, or  
 “ granted respectively *the ancient and accus-*  
 “ *tomed yearly rents, duties, and services, or*  
 “ *more, or as great* OR BENEFICIAL *rents, duties,*  
 “ *and services, or more, as now are or at the*  
 “ *time of demising* or granting the premises so  
 “ to be demised, leased or granted respectively,  
 “ *were reserved or made payable* for or in respect  
 “ of the same premises respectively, or a just  
 “ proportion of such ancient, or the present re-  
 “ served rents, duties, and services, or more, ac-  
 “ cording to the value of the premises so to be  
 “ demised, leased or granted respectively (except  
 “ heriots,

1819.

DOE, dem.  
 Earl JEREMY  
 and others  
 v.  
 SMITH  
 and others.

First condi-  
 tion of the  
 leasing power,  
 referring to  
 the ancient and  
 accustomed or  
 as great or be-  
 neficial rents.

1819.

DOE, dem.  
Earl JERSEY  
and others

v.  
SMITH  
and others.

Second condi-  
tion of the  
leasing power  
on which the  
question turns.

Other condi-  
tions not ma-  
terial.

“ heriots, which shall or may be varied, altered,  
“ or compounded for, according to the will and  
“ pleasure of the said *George Venables Vernon*  
“ and *Louisa Barbara Mansel*) *all such rents,*  
“ duties, and services respectively, to be incident  
“ to and go along with the reversion and remain-  
“ der of the same premises expectant on the  
“ determination of the said respective demises,  
“ leases, and grants thereof; and *so as there be*  
“ *contained in every such lease A power of re-*  
“ *entry FOR non-payment of the rent thereby to*  
“ *be reserved:* and so as the respective lessees,  
“ to whom such lease or leases shall be made as  
“ aforesaid, be not by any express clause to be  
“ contained in any such leases respectively freed  
“ from impeachment of waste, and so as the said  
“ respective lessee or lessees, to whom any such  
“ lease or leases shall be made respectively as  
“ aforesaid, doth and do seal and deliver a coun-  
“ terpart or counterparts of such lease or leases  
“ respectively:

Second (or  
second part of  
the) leasing  
power for  
years, under  
twenty-one,  
absolute.

“ *And also by indenture or indentures under*  
“ their respective hands and seals, attested as  
“ aforesaid, to demise, lease or grant all or any of  
“ the said manors, messuages, lands, tenements,  
“ hereditaments and premises, so limited to them  
“ *George Venables Vernon* and *Louisa Barbara*  
“ *Mansel* for their respective lives, for any term  
“ or number of years absolute, not exceeding  
“ twenty-one years, *to take effect in possession,*  
“ *and not in reversion* or by way of future inte-  
“ rest; *so as upon every such lease* for an absolute  
“ term

" term not exceeding twenty-one years, *there*  
 " *were reserved* and made payable during the  
 " continuance of such lease or leases *so much*  
 " *or as great and* BENEFICIAL yearly and other  
 " rent and rents, and other services proportion-  
 " ably, *as now is and are therefore paid* and  
 " yielded, *or the best or most improved yearly*  
 " rent and rents that can be reasonably had or  
 " obtained for the same, *without taking any fine,*  
 " premium, or fore-gift, or any thing in the na-  
 " ture of or in lieu thereof, to be incident to and  
 " go along with the reversion and remainder of  
 " the same premises, expectant on the determina-  
 " tion of the said respective leases; and so as  
 " the respective lessees to whom any such lease  
 " or leases shall be made respectively as afore-  
 " said, be not expressly freed from waste, and  
 " do seal and deliver counterparts of such leases  
 " respectively; and so as in every such lease for  
 " any term of years absolute respectively *there*  
 " *be contained a clause of re-entry, in case the*  
 " rent or rents thereupon to be reserved *be behind*  
 " or unpaid by the space of twenty-eight days  
 " after the times thereby respectively appointed  
 " for payment thereof:


1819.

DOE, dem.  
 Earl Jersey  
 and others  
 v.  
 SMITH  
 and others.

" And also by indenture or indentures under  
 " their respective hands and seals, attested as  
 " aforesaid, to demise, lease, and grant all or any  
 " part of the lands, hereditaments and premises  
 " so limited to them, the said *George Venables*  
 " *Vernon and Louisa Barbara Mansel*, for their  
 " respective lives as aforesaid, wherein or where-  
 " upon

Third (or third  
 part of the)  
 leasing power,  
 as to the mines.

1819.

  
 Doe, dem.  
 Earl Jersey  
 and others  
 v.  
 Smith  
 and others.

“ upon any mine or mines now is or are open;  
 “ or wherein or whereon any person or persons  
 “ shall be willing to open any mine or mines,  
 “ sough or soughs, or other thing or things what-  
 “ soever which may be requisite and necessary  
 “ for the digging and getting of lead or copper  
 “ ore or any metal or mineral whatsoever, unto  
 “ any person or persons for any term or number  
 “ of years, not exceeding thirty-one years, to  
 “ take effect in possession and not in reversion  
 “ or by way of future interest; and *so as upon*  
 “ *every such lease* for an absolute term not ex-  
 “ ceeding thirty-one years *there be reserved* and  
 “ made payable during the continuance of such  
 “ lease or leases, such part or share of the lead,  
 “ copper ore, coal and other produce, to be  
 “ gotten from the said mines, or *such yearly rent*  
 “ *or income in respect thereof, as can reasonably*  
 “ *be had or obtained for the same, without taking*  
 “ *any fine, premium, or fore-gift, or any thing*  
 “ in the nature or in lieu thereof, to be in-  
 “ dent to and go along with the reversion and  
 “ remainder of the said premises, expectant on  
 “ the determination of the said respective leases;  
 “ and so as” (&c. as before); “*and so as there be*  
 “ also inserted *such proper and usual covenants* for  
 “ the effectually winning and working the said  
 “ mines, and smelting the ore, and doing all other  
 “ proper and necessary acts *as are usually inserted*  
 “ *in leases of the like nature.*”

The special verdict then finds the following facts:—that by force of the last mentioned deed,

G. V. Vernon,

*G. V. Vernon* after the marriage became seised for life of the last-mentioned lands, and entitled to and in the receipt of the rents and profits thereof—that at the date of that settlement, and after until the surrender made at the time of making the indenture next mentioned and therein referred to, *the lands in the declaration mentioned, had been and were leased and were under and subject to a lease to certain persons* for a term of years determinable on the lives of three persons who died before the day of the demise laid in the declaration—that after the date of the settlement and the solemnization of the marriage, *viz.* on the 5th of *September, 1803*, the said *G. V. Vernon* being so seised &c. executed, by his then name and title of Lord *Vernon*, an indenture of that date, between himself of the one part, and *Charles Smith* (since deceased) and the defendant in error of the other part; whereby it was witnessed, that in consideration of the surrender of the former lease, and of 105*l.* paid to Lord *Vernon* by *Charles Smith*, and the defendant and of the yearly rents, duties, payments, services, articles, covenants, provisoes, and agreements thereafter specified and reserved, and by and on the part of the lessees to be paid, done, performed and kept, the said Lord *Vernon* demised, granted &c. to *Charles Smith* and the defendant, the messuage, tenement, and lands, with the appurtenances; (the premises in question sought to be recovered by the ejectment) To hold from the day of the date, for ninety-nine years, if the lessees and *John Smith*

1819.

DOE, dem.  
Earl JERSEY  
and others

v.  
SMITH  
and others.  
Facts founded  
on reference  
to the former  
leases.

The lease in  
question.



1819.

DOE, dem.  
Earl JERSEY  
and others

v.

SMITH  
and others.

*Reddendum.*

(a son of *Charles Smith*), or either of them, should so long live: yielding therefore yearly during the said term unto the said Lord *Vernon*, his heirs and assigns, or the person or persons to whom the freehold and inheritance of the premises should for the time being belong, *the yearly rent of 2l. at Michaelmas and Lady-day, by equal portions, together with one couple of fat capons on the 1st day of January yearly during the term, or the sum of 1s. 6d. in lieu thereof, at the election and choice of the said Lord Vernon, his heirs or assigns, or the owner of the inheritance; and also an heriot of the best beast, or 40s. in lieu thereof at the like election &c. upon the death of every tenant dying in possession; and the like upon every assignment, sale, forfeiture, or alienation: and also the lessees yielding and doing constant suit of mill.*

Covenant by  
the lessees for  
payment of the  
rent.

The verdict then found that the lease contained a covenant in the following words:—" And the lessees for themselves, their heirs, executors, administrators, and assigns, and for every of them, do covenant, promise, and agree to and with the said *George Lord Vernon*, his heirs, executors, administrators, and assigns, and to and with such person or persons to whom the immediate freehold or inheritance of the premises shall as aforesaid belong, and to and with every of them in manner and form following, that is to say, that they (the lessees), their executors, administrators, and assigns, some or one of them, shall and will well and duly during

" the

1819.

**Doe, dem,  
Earl Jersey  
and others  
v.  
SMITH  
and others.**

The proviso  
for re-entry for  
non-payment  
of rent.

First condition  
in the clause  
for re-entry,  
on which the  
objection was  
partly found-  
ed.

Second and  
principal con-  
dition in the  
proviso, on  
which the ob-  
jection was  
chiefly found-  
ed.

General clause  
for re-entry.

“ the said term, pay, do, and perform, or cause  
 “ to be paid, done, and performed, unto the said  
 “ *George Lord Vernon*, his heirs or assigns, or  
 “ such person or persons to whom the freehold  
 “ or inheritance of the premises shall, as aforesaid,  
 “ belong and every of them, the said yearly  
 “ rent or sum of two pounds and the said duties,  
 “ heriots, suits, services, and other the reserva-  
 “ tions aforesaid and every of them, at the  
 “ times and in the manner above limited and ap-  
 “ pointed for payment and performance of the  
 “ same, or else the several sums reserved in lieu  
 “ thereof: *Provided* always, that if it shall hap-  
 “ pen at any time during the estate hereby grant-  
 “ ed, *that the said yearly rent or sum of two*  
 “ *pounds and every or any of the duties, services,*  
 “ *reservations, and payments hereby reserved, or*  
 “ *any part thereof, shall be behind, unpaid, or*  
 “ *undone, in part or in all,* BY THE SPACE OF  
 “ **FIFTEEN DAYS** *next over or after any or either*  
 “ *of the days or times whereat or whereupon the*  
 “ *same ought to be paid, done, or performed, as*  
 “ *aforesaid,* AND NO SUFFICIENT DISTRESS OR  
 “ DISTRESSES CAN OR MAY BE HAD AND TAKEN  
 “ UPON THE SAID PREMISES, *whereby the same*  
 “ *and all arrearages thereof (if any be) may*  
 “ *be fully raised, levied and paid;*” (or if the les-  
 sees do not repair within six months after notice;  
 or do commit waste, or grind their corn at any  
 other mill, or assign without licence;) “ *or if*  
 “ *any default shall be by them the lessees, their*  
 “ *executors, administrators, or assigns, made in*  
 “ *the payment or performance of all or any of*  
 “ the

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*" the (omitting the word rents) reservations,  
 " covenants, and agreements hereinbefore on  
 " their parts contained, that then and from  
 " thenceforth in all, or any, or either of the  
 " said cases it shall and may be lawful to and  
 " for the said George Lord Vernon, his heirs and  
 " assigns, and the person and persons to whom  
 " the freehold or inheritance of the premises  
 " shall as aforesaid belong, into and upon the  
 " said premises hereby demised, and into every  
 " part and parcel thereof, wholly to re-enter;  
 " and the same to have, hold, retain, possess,  
 " and enjoy, as in his and their former and  
 " proper estate, against (the lessees) their exe-  
 " cutors, administrators, or assigns; these pre-  
 " sents or any thing herein contained to the con-  
 " trary thereof in anywise notwithstanding."*

## Facts

The verdict then found, that no other than the above recited power of re-entry for non-payment of the rent reserved by the same indenture was contained therein — that the lessees executed and delivered a counterpart — that *the several rents, duties, reservations, and payments rescroed by the indenture of the 5th September, 1803, and secured by such render, covenants, and power of re-entry therein contained, were, at the time of making the last-mentioned indenture, the ancient and accustomed yearly rents, duties, and services and then were as great and beneficial rents, duties, and services as the yearly rents, duties, and services, which at the time of making the deed of the 2d July, 1757 or at any*  
*time*

*time thereafter, previous to or at the making of the indenture of the 5th September, 1803, were or had been reserved or made payable or secured for or in respect of the lands and tenements by the same indenture mentioned to be demised — that the lands and tenements, with the appurtenances in the declaration mentioned, were the same lands and tenements, and that THE USUAL AND ACCUSTOMED FORM OF LEASES of the estate contained in the marriage settlement of 2d July, 1757, for lives or years determinable on lives, AS WELL PRIOR AS SUBSEQUENT TO THAT SETTLEMENT, was with a conditional proviso of re-entry similar to that in the indenture of 5th September, 1803 — that all the rents, duties, and services reserved by the last-mentioned indenture, and which accrued in the life-time of Lord Vernon, had been discharged and performed; and that Henry Smith had been ready to pay and perform all sums, matters, and things that would have accrued to this time, supposing the last-mentioned indenture to have continued in force and undetermined — that Charles Smith was since deceased, but that Henry Smith and John Smith were still living — that after the making of the last-mentioned indenture, and before the day of the plaintiff's demise, L. B. Mansell, by virtue of the powers to her given by the deed of the 2d July, 1757, made her last will and testament in writing, dated the 5th August, 1783, which was duly published &c. &c., and thereby devised the said lands and tenements devised by the will of Lord Mansell to her, subject to the estate for*

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DOR, dem.  
Earl JERSEY  
and others  
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and others.

The fact on which the objection on the point of the admissibility of evidence was founded.

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life of her husband therein ; — and that the devisees afterwards bargained and sold the said estate to *George Earl of Jersey, Edward Ellice, and Alexander Murray* (the lessors of the plaintiff), who thereupon became seised in remainder, and on the death of Lord *Vernon*, on the day of the demise laid in the declaration, became seised thereof in their demesne as of fee. Lease, entry, and ouster.

1818.

Easter Term,  
58 Geo. III.

The case now came on for argument on the errors assigned, when

*Littledale* was heard on the part of the plaintiff in error, and

*Gifford*, then Solicitor-General, on behalf of the defendants.

The Court having required to have the points discussed a second time, the case stood over for that purpose, and it was now argued again by

1819.

Hilary Term,  
59 Geo. III.

*Jervis* for the plaintiff, and

*Moysey (F)*, for the defendant.

Of the ability, learning, and research displayed by the several Counsel who argued in support of either side of the question upon each occasion, many of the learned Judges will be found in the following pages to have borne approving testimony in delivering their opinions; but as every single

single principle or proposition stated and reasoned upon *arguendo* in the progress of the various discussions at the bar, have been repeated with great force by some or other of their Lordships on the bench, in detailing the reasons on which their different conclusions, on the points in the case, were founded; and as nearly every authority which was cited in argument has also been mentioned and commented on by the Judges in delivering their judgments, the Reporter has taken the liberty of omitting, in a case necessarily of so great length, the arguments of Counsel altogether, for which, perhaps, the desire to avoid the unprofitable prolixity of needless repetition, will be considered a satisfactory motive.

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The Court this day pronounced judgment, stating the various reasons and the authorities on which their several opinions had been formed, *seriatim*.\*

1819.

Easter Term,  
59 Geo. III.  
Saturday  
22d May.

RICHARDSON, J. (who was present) having been, while at the bar, one of the Counsel for the lessors of the plaintiff, declined taking any part in the judgment.

GARROW, *Baron*. — The question in this case arises on the construction of a power, to make leases, which was given to the lessor by the deed of marriage settlement, of which the terms are set out fully in the special verdict; and it is — whether the lease, the validity of which is the point now before us, granted by Lord *Vernon*, (who became possessed of the estate, under the

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Earl JERSEY  
and others  
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settlement, as tenant for life) to the defendant and another person (since dead) for 99 years, if the lessees and a son of one of them should so long live — was made in due execution of the leasing power or not: in other words — whether the terms of the lease are, or are not in conformity with the power so given to the lessor by the settlement. If they are not, the lease is void: if they are, it is valid, as being a good execution of the leasing power. In the former case, the judgment\* which has been pronounced below by the

\* As that judgment has not hitherto been reported, and perhaps will not now be published, it may be of use to introduce it here.

## DOE on the demise of JERSEY v. SMITH.

1816.

28d December.  
K. B.

LORD ELLENBOROUGH, *Chief Justice*, this day delivered the judgment of the Court of *King's Bench*, (having stated the terms of the leasing powers in the settlement, and of the proviso in the lease, and the facts found by the special verdict) in the following words:—

The first part of the power, therefore, relates to leases determinable upon lives, upon which it would be sufficient to reserve the ancient rents. The second part applies to leases for years, upon which the best and most improved yearly rents that could be reasonably had or obtained, were to be reserved. Upon the former part (the leases determinable upon lives) there was to be a proviso of re-entry for non-payment of the rent thereby to be reserved: upon the latter (the leases for years) there was to be a clause of re-entry in case the rent were behind or unpaid by the space of twenty-eight days after the time appointed for the payment thereof; it being in the one case left undefined what was to be the tenor of the clause of re-entry; in the other it being provided, that such clause should fix the right of re-entry at the period of twenty-eight days after the rent should have become due. The

same

the Court of *King's Bench*, ought to be reversed; in the latter it must be affirmed.

His

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Dox, dem.  
Earl JAMES  
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same Lord *Vernon* who is mentioned in the marriage settlement and leasing power therein contained (and who was tenant for life with a power for leasing under that settlement), on the 5th of *September*, 1803, executed a lease, upon which the question arises, to *Charles Smith* and *Henry Smith* for years determinable on lives; and that lease is now sought to be set aside, by this ejectment, by the lessors of the plaintiff, who have since, by devise, and by lease and release, become entitled to the premises in question in fee; and it is sought to be set aside on the ground of its not being conformable to the terms of the power, on the subject of re-entry, which such a lease (a lease for years determinable upon lives) is required (as it is said) to contain. The power directs that there be contained in every such lease a power of re-entry for non-payment of the rent: it does not say *what power*, but *a power* only. The lease executed under this power does contain a power of re-entry for non-payment of rent; for it contains the following proviso:—(his Lordship read the words of the proviso.) The lease (continued he) likewise contains provisions for re-entry upon other defaults and breaches of covenant; but as the power in question relates only to re-entry for non-payment of rent, the statement of the others is immaterial.

It is contended, that the leasing power requires that a provision for re-entry for non-payment of rent perfectly general and unqualified in its terms, should be expressed in the leases to be made under it; inasmuch as the power itself contains no qualification, and only requires a power of re-entry for non-payment of rent. Under a power of re-entry thus general and unqualified, the effect would be, that the tenant for years determinable on lives might be instantly ejected the moment his two pounds annual rent was in arrear; although upon the rack-rent being in arrear on leases for years absolute, and where the rent might be of some value in amount, the power does not allow of re-entry till after it should be in arrear twenty-eight days, thus making the rigour of the rule extreme when there is the least reason for enforcing it. Where the construction of a power leads to such unreasonable and inconvenient consequences, it naturally produces a disposition to



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Don, dem.  
Earl Jussary  
and others

v.  
SMITH  
and others]

His Lordship then stated the limitations contained in the deed of settlement on the terms of which

to examine with some exactness, the terms in which the power is contained, and to see whether the letter of the provision does absolutely require such construction. The leasing power says, that the lease must contain a power of re-entry for non-payment of rent, not *on* non-payment of rent, nor to be exercised immediately upon the occurring of that default; it is silent as to the time when it should be carried into effect, and being so silent, why should it not, in virtue of such silence, be intended that the creator of the power thought it enough to require that there should be some reasonable power of re-entry for non-payment of rent upon every lease; leaving it to the discretion of the person by whom it should be granted, to prescribe when and under what circumstances that power of re-entry should in each particular case be enforced. By requiring that the leases should always contain a power of re-entry, he calls the attention of the successive lessors from time to time to the subject, whenever the occasion of leasing should recur, and when the attention of the lessor is called to it, it is hardly likely that he should in any case, in the exercise of a proper discretion, introduce into his lease so harsh and rigorous a clause as the letter of this provision would, upon the construction now contended for, introduce universally; and in all cases whatsoever, in the exercise of a proper discretion, he would probably adopt the usual clause for re-entry which he should find inserted in the former leases of the same property, or would, in some other mode, qualify it by reference to the time during which the rent had been in arrear, or to the want of adequate means of enforcing the payment of it by distress, or to both; but in no case under the guidance of a sound discretion, would he give a power of re-entry which may be exercised summarily, immediately, and universally, without an hour's respite to be allowed in favour of the tenant. Besides, what eligible tenant would accept a lease containing a provision so inconvenient and degrading, under which he might be thus instantly dispossessed for the default of a single moment. By construing the words "a power of re-entry," as meaning *any* or *some*, the provision, it will be said, on one side contains too little of restraint upon the person who is to exercise the power; but, on the other hand, it may be answered,

which the question was founded; observing, that it applied to different estates, which were directed

to

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answered, that by the other construction, by which it is made to mean a general and absolute power of re-entry, unqualified by any consideration of time or circumstance, it is made to import too much. Of the two constructions of which the indefinite words in question are susceptible, it is certainly the safest course to understand the power as bearing that sense which best accommodates itself to the convenience of the parties who are to be governed by them. In a case like this—where the framer of the restraint had it in his power to have prescribed the rule in such terms as he pleased, and to have obviated all doubt, which he might reasonably have been expected to have done, had he thought the power of re-entry in the then subsisting leases open to objection—we do not conceive ourselves as contravening any legitimate rule of construction, when we hold, that the restraint of leasing should not, in this instance, be carried in construction to an extent which is to leave no discretion in the person executing the power; and supposing we are right in so holding, we further think that the discretion which, upon such construction, is necessarily left to the person who is the object of the power, has been well exercised in the present instance.

An objection also has been taken to the admission in evidence of other leases of the same premises, in order to prove, as stated in the special verdict, that the usual and accustomed form of leases of the estate contained in the marriage settlement or deed of the 2d July, 1757, for lives, or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the indenture in question of the 5th of September, 1803. But this objection cannot, upon the view we have already taken of the case, arise in the present instance; for if we are right in holding that the person who had to exercise the leasing power, had any discretion as to the terms of that proviso of re-entry, which he is generally required to insert in this lease for years determinable on lives, he might certainly, with great propriety, refer to those former leases as a guide to the discretion which he should exercise on the subject; and the Court, in judging of the manner in which

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to be let upon different sorts of leases — some being to be granted for long terms determinable upon lives, and for lives, and others for short terms of years absolute; — that the leasing power given by the deed of settlement requires different conditions of holding to be contained, and restrictions to be inserted in the leases executed under the power, of which the terms are various as applicable to the different species of property, and the different periods of duration of the several leases; for that in leases to be granted for terms of less than twenty-one years absolute, a rent is required to be reserved, as nearly equal as possible to the annual value of the lands let; and all such leases must contain a power to re-enter in case the rent reserved shall be in arrear for the space of twenty-eight days after it shall become due. Then (continued his Lordship)

which such discretion had been exercised, might as fitly look to the former leases on the subject. Upon this ground it is unnecessary to discuss the cases of *Cook v. Booth* (a) and *Iggulden v. May* (b), which do not apply to a case of a lessor who has a discretion to exercise as to the terms of his leases.

There are other grounds, also, upon which the admissibility of this evidence might be maintained, which were in part discussed on the argument, but which are not necessary to be adverted to upon this occasion.

The result of our opinion upon the whole is, that the lease in question is not at variance with the power; that the former leases were properly admissible in evidence; and that therefore the defendant is entitled to the judgment of this Court.

Judgment for the defendant.

(a) Cowp. 809.

(b) 7 East, 237. & 9 Ves. 325.

with

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with respect to the leases allowed to be made for long terms determinable upon lives, under which sort of lease the lands sought to be recovered by the present ejectment were let, and which had been formerly demised in the same manner; it is provided by the terms of the power, that wherever a lease shall be made for such a term, there shall be contained therein a power of re-entry for non-payment of rent: so that in this leasing power there is certainly no time specified, by way of indulgence to the tenant, as to the payment of the rent reserved; nor is any thing further required of the tenant for life who should be in possession of the estate, than merely that he shall insert in the lease a power to re-enter upon the premises for non-payment of rent. Now it has been strongly insisted, in argument, that it was obviously the object of the creator of the power to take care of the interest of the reversioner. I agree that it was one of the objects of the settlor to take care of the interest of the reversioner; but at the same time I say, that it was equally his object to take care of the interest of the tenant for life; and to make the estate, whilst in his hands, whoever he might be, a beneficial estate: and to that end it was fit to entitle him to impose such terms as to the holding, as would be most beneficial to the property itself; and in that view, certainly, whatever would be beneficial to the tenant for life, must also necessarily be for the benefit of the reversioner, and the converse would be equally true.

Now,

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Now, in point of fact, the lease in question, as granted by Lord *Vernon* to the defendant and his deceased co-lessee, does contain a clause for re-entry, not generally, certainly, nor in case the rent shall be in arrear for twenty-eight days; but by a proviso, that if the rent shall be in arrear for the space of fifteen days, and if there shall be no sufficient distress upon the premises to satisfy that rent, it shall then be lawful for the lessor or the reversioner to re-enter.

The present question turns entirely upon that proviso; and it is simply whether this lease, so containing such a clause, is a good execution of the leasing power: or in other words, whether that proviso is a reservation of such a power of re-entry as will satisfy what has been required by the creator of the power, to entitle the tenant for life to make leases, as given by the deed of settlement. It is obvious that the creator of the power, as the expression is in a Court of Law, but, in fact, his legal adviser, knew how to make distinctions as to the power of re-entry; for in the instance of those leases which were to be for years absolute, wherein the rent to be reserved is to be of the most valuable description, he only requires of those who shall successively come into possession of this estate, as tenants for life under the deed of settlement, that they shall, for the preservation of this estate, most beneficially for those who shall be from time to time entitled as reversioners, insert a condition, that in case the valuable rent so reserved on such leases shall be unpaid for the space of twenty-eight

eight days, the lessor or reversioner shall then have a right to re-enter at the expiration of those twenty-eight days. It has been insisted, however, in argument, that, where the render is 2*l.*a year, and a couple of fat capons, or eighteen pence, at the option of the lessor, in that case the power of re-entry is to be altogether absolute and unconditional; and that at the first moment after the day has expired on which the money is demandable, the power of re-entry is peremptorily to attach and enable the reversioner on the instant abruptly to turn out the person who, holding under a valuable lease for a long term of years, determinable upon lives, should have supinely permitted the clock to make its round, so as *to complete that day, without paying* the small sum of 2*l.* If the power had required in terms that the lessor should reserve such an unconditional right to re-enter the moment after the rent had become due and had not been paid or tendered, I should admit that the argument which was so strongly pressed upon the Court, would have had much weight, and perhaps we could not alter it; for we must take the power as we find it: and if the creator of the power had inserted that special condition, I should have thought perhaps that we could not depart from it, and make another power. We are, however, only to see whether in fact the power in question, such as it is, so presented to our consideration, has been complied with or not; and where we find a general power required, and see that in fair reason it has been conformed with, we ought not to be more strict in the interpretation to be put on it, than the creator of the power himself

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himself has been. The terms of the requisition in the settlement are, that there shall be contained in the leases a power of re-entry for non-payment of rent. Is there not in the lease granted to the defendant a power of re-entry for non-payment of rent? Undoubtedly there is. But it is stated; and I admit with very considerable force, that this is not such a compliance with the requisition of the power as the reversioner has a right to expect the lessor to have observed; because he has clogged the clause for re-entry, not only with a delay of fifteen days, but also with a further qualification which imposes on him the necessity of previously ascertaining that there be no sufficient distress upon the premises. Now, with the utmost respect and deference for the great authorities who differ from me, I conceive the obvious answer to the first objection to be, that there is nothing unreasonable in the interposition of that convenient delay: and as to the second objection, we cannot but consider (for in looking at these questions we must use the experience of all mankind upon such subjects) that the event of there not being a sufficient distress upon the premises in a case of this sort, on a valuable farm paying a nominal rent of 2*l.* a year, is not to be contemplated in the common course of things, and most probably was never thought of by the maker of the settlement. Without therefore taking up more of the time of the Court, it appears to me that there being in fact to be found in this lease a clause of re-entry for the non-payment of rent reserved to the per-

son

son to whom the rent is to be paid, giving him a power to re-enter if fifteen days shall elapse without payment of it, and there shall be no means of satisfying it by distress upon the premises; and I cannot but consider that such a power is a substantial satisfaction of the condition in the settlement, which requires generally only that there shall be inserted a power of re-entry for non-payment of rent.

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His Lordship (having observed that he so entirely concurred with the judgment delivered on this question by Lord *Ellenborough*, that he might have adopted his words) concluded by adding, that he had not noticed the second question, whether the prior and subsequent leases were properly admitted as evidence of the facts introduced into the case which were founded upon reference to them; because (said he) if I am right in the opinion that the leasing power has been complied with by the insertion in the demise of the proviso for re-entry which has been introduced, it necessarily follows that the person who, whilst in possession of the estate, should make leases under the power, would be warranted in taking the then subsisting leases of the same property as a criterion for the rent and the covenants to be inserted in the new leases; and that therefore they were properly submitted to the jury on the question, whether the lease in dispute was a good execution of the power of leasing given by the deed? because if it should appear that the terms and conditions of former



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leases had been adopted by the lessor, it would go far to direct them as to the verdict they should find.

**BURROUGH, J.** (having shortly stated the question, and observed, that in order to give an intelligible opinion, it would be necessary to state the words of the power, as many of his observations would apply to the import of those words, and which in themselves he considered to be decisive of the question) read at length the clause in the settlement by which the leasing power was given to the tenant for life, as set out *verbatim* in the statement of the case—the principal and other restrictive clauses—the other two leasing powers—and the general clause for re-entry at the conclusion (*ante*, p. 284 to 288, the material parts of which are distinguished by italic letters); and stated the short substance of the case as found by the special verdict. He then proceeded to give the following reasons for the judgment he was about to deliver: The first point which arises upon this special verdict is, whether on the question to be submitted to the jury—the sufficiency of the proviso of re-entry in the lease in question—the fact of the insertion of a similar proviso in prior and subsequent leases could be made use of in construing the power contained in the deed of settlement, and upon that point I am of opinion that they could not. Parts of each of these powers refer to a pre-existing state of the property, and to cases of former leases; for instance, the first power authorises leases to be made of lands then let,

let, requiring only the reservation of the ancient and accustomed rents. The other powers require the reservation of as great and beneficial rents, &c. as were then paid, or the best and most improved rent that could be had. I mention those parts of these powers for the purpose of contrasting them with the clause on which the question immediately depends. There are cases wherein evidence of former leases, and even parol evidence must of necessity be received, as where the parties to a deed refer to matters of fact, and make the knowledge of them necessary to explain the nature, and supply the terms of the instrument to be founded on them—they then become a part of the particular transaction, and there the matters which might result from such a reference being necessarily found by the jury, would be proper for our consideration. But there is nothing in the words of the clause in question which admits of a reference to leases made prior and subsequent to the settlement. The only words in the clause are, “and so as there be contained in every such lease, a power of re-entry for non-payment of rent.”

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The clause itself, then we see, contains nothing which refers us to any former particular state of this property; I am therefore of opinion that the prior leases were not admissible in evidence, because they could not be legally used in any way in the construction of this power.


I now come to the consideration of what should

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be the construction of the power itself upon which arises the question, whether the settlement requires only such a power of re-entry as is contained in the lease, which is made to depend on two preceding conditions: *viz.* if the rent be behind and unpaid by the space of fifteen days, and no sufficient distress can be had or taken upon the premises. I am of opinion that neither of these restrictions, so imposed upon the right of re-entry, is authorised by the leasing power. First, because the words of the power convey to my apprehension a plain and specific meaning; for “a power of re-entry being required to be given, if rent shall be behind and unpaid,” is a perfect idea, wanting no explanation; but a clause giving power of re-entry only in case the rent shall be behind for fifteen days, is a very different thing; and the difference is still greater if you superadd, “in case no sufficient distress can be had or taken on the premises.” It must be borne in mind throughout, that this is a power for a lease to be granted by a tenant for life, and that he, without such a power, could make no lease which would endure beyond his death. It is moreover a power created by *deed*, and it is quite new to the law, for Courts to put any construction upon such a power beyond the plain and literal meaning to be collected from the words upon the face of the deed. If any lawyer’s attention had been drawn to these words in the leasing power, with a view to the execution of a lease, he would not, I think, have signed his approbation of the draft of this lease. Other men,  
 indeed,

indeed, are too often apt to treat the authority on which their title rests too lightly, until they feel the consequences, when the thing is done.

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Secondly, it is contended, that the power of re-entry, required to be inserted, is not so specifically described as to be considered insufficient if the power reserved be a reasonable one; but who is to judge whether it be reasonable or not? the parties to the deed, or a Court or Jury? By what definite rule are we to be guided in judging of its being reasonable? That is a difficulty which I know not how to combat. I am of opinion at all events, that such an indefinite criterion cannot be admitted to govern our construction of a power, and which might vary the meaning of the parties, and, more especially, where the construction is to be collected clearly and completely from the words of the deed itself.

Thirdly, the plain meaning of the words of parties to a deed I hold to be binding. Now, I cannot bring myself to read this deed, without a conviction that the parties meant that the leases should contain a pure and simple clause of re-entry. The second power enables the successive tenants for life to make leases for terms not exceeding twenty-one years; and for that the party expressly provides in words, that "there shall be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid *by the space of twenty-eight days* after the times thereby respectively appointed for payment thereof."

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of." This affords to my mind an irresistible argument for excluding any such qualification from the former power. The parties have used none but general terms in the formation of the first power, and have adopted special terms in the formation of the second.

The lease in question cannot be maintained, unless we can consider that the lessor, by the terms of the first power, had a right to bind the inheritance with both these restrictions—1st. that the right to re-enter shall not arise unless the rent shall be behind for the space of fifteen days; and, 2dly. not even then, if a sufficient distress can or may be had or taken on the premises: and I consider myself bound to hold both those restrictions to be not in conformity with the leasing power; for that they make the power more prejudicial to the inheritance than if the plain terms of it had been pursued in framing this lease by the tenant for life.

As to the prejudicial effect of introducing the condition, that there must be no sufficient distress on the premises, it appears to me that the case of *Coxe v. Day* is precisely in point; and I agree with the learned Judges who signed the certificate in that case. Such a clause imposes the greatest inconveniences on the remainder man; and we have not only the authority of *Coxe v. Day* for that, but we have it also practically exhibited in the case of *Rees*, on dem. of *Powell v. King* (a).

(a) Forrest. Exch. Rep. 19.

This question was very ably argued at the bar, and a great number of cases were cited; but the two which I have mentioned, and the plain intention of the parties expressed in the deed, are sufficient to govern my judgment. I wish to add a word only with respect to the general clause of re-entry, towards the end of the lease, because it was noticed at the bar that the word "rents" is omitted in that clause, and an argument was founded upon it, which has much weight with me. I think that word was designedly omitted; for it cannot be taken that the parties meant that clause to apply to a case which was before fully provided for, according to the requisitions in the powers. The omission of the word "rents" in that clause, was adverted to in the Court below; but it appears to have been treated upon that occasion as not worthy of much notice.

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I have considered this case, with an anxious wish to find myself justified in concurring in affirming the judgment which has been pronounced by the Court below; but finding that I cannot do so without sacrificing the opinion that I have formed on the question after great attention to the case, I am bound to pronounce that opinion to be, that the judgment of the Court of *King's Bench* ought to be reversed.

PARK, J.—In giving my opinion that the judgment of the Court of *King's Bench* ought to be reversed, I should much distrust my own view of the questions in this case, opposed as it is, to the

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great learning and ability of those by whom that judgment has been pronounced, and of those from whom I have now the misfortune to differ in thinking that it was not well founded in point of law; but that in so deciding I do not stand alone, nor am without the support of much greater learning and ability than my own.

This case has been argued very elaborately, and with very considerable ability at the bar, and much research has been bestowed upon it. The main question is, however, a very short one (having stated the question and the words of the power in the deed, and of the proviso in the lease, and of the restrictions therein imposed on the right of re-entry). These (continued his Lordship) are the only words which are material to the present inquiry, and they do not present any difficulty to my mind; for if a plain man were asked, how he would execute such a power? he would say, insert a clause, that if the rent be not paid as reserved, the lessor shall have power to re-enter. How much then must he be surprised to find two conditions superadded, materially altering the right of the remainder-man, which he can no where find in the power.

[Here his Lordship read the words of the proviso for re-entry.]

I admit, that in construing powers the intention of the creator of the power is to be attended to, wherever it can be collected from the instrument;  
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but that intention is to be construed strictly and impartially, and without favouring one party more than the other, that is, without leaning either to the side of the tenant for life, or to that of the remainder-man, as was said by Lord *Mansfield* in the case of *Goodtitle*, dem. *Clarges* and another v. *Funucan* (a); and the same doctrine is to be found in the case of *Pomery* v. *Partridge* (b). The reason is obvious, because a power given to make leases is intended to operate beneficially for both parties. By enabling the tenant for life to grant a permanent interest, the farmer is induced to cultivate and improve the soil of the estate by which the remainder-man is ultimately equally benefited; the one during his life having advantage of a well cultivated estate; and the remainder-man on his death finding the estate has not been suffered to become impoverished. Still, however, I admit by the execution of the leasing power by the tenant for life, the remainder-man is certainly not to be prejudiced; but can any one, who reads this lease, and compares it with the power, avoid seeing that the former is not all conformable to the latter; and that by the proviso for re-entry in the terms of this lease, the remainder-man is placed in a situation far less beneficial and advantageous than the maker of the power intended that he should and than he would have been in, if the right of re-entry had been reserved according to the terms of the power? or it must be considered by those who think otherwise, that a clause of

(a) Doug. 573.

(b) 3 T. R. 674.

re-entry,



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re-entry, limited and clogged with conditions, is as beneficial as one which is unlimited, unclogged, and absolute, without any condition. It appears to me, that if this case turned entirely upon the insertion of the first condition alone, that which restrains the right to re-enter unless the rent be in arrear for fifteen days, the leasing power authorising no such restriction, would of itself be sufficient to avoid this lease. It has been argued, that the delay of the right of re-entry for fifteen days is nothing more than a reasonable time. The objection to that is, if fifteen days be reasonable, why may not thirty or forty be so; but in point of fact the maker of this power never contemplated the insertion of any such condition. On the contrary, we find that immediately after in the next power, and when she meant to give the tenant time, she has said so expressly; and therefore she well knew that if she intended any such thing it was necessary to express it: now nothing to my mind can be a stronger argument, grounded on intention in this case, against the validity of this lease than that circumstance; for the requiring the restriction to be introduced in the one case amounts clearly to an exclusion of it in the other, and that with me is quite decisive. But it is not necessary to rely entirely upon this part of the case; because it is clear, that if the power be badly executed by not being pursued in any one respect, the lease is void altogether. Then, as to the second objection, with all deference to the very learned Judges who have differed, as well as those who may differ from me, I have  
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never been able to entertain a doubt upon that point. In a condition that the reversioner shall not be entitled to re-enter except "there shall be no sufficient distress upon the premises," is there no clog or impediment to a right of re-entry? Is so limiting such a right no injury to the remainder-man in the enjoyment of his estate that he cannot enter for the condition broken till he has searched every corner of the premises for a sufficient distress? That he must do so has been decided by the Court of *Exchequer*, by a decision on a case in which they confirmed the opinion of a very learned Judge (Mr. Justice *Heath*), who had so ruled the point at *Nisi Prius*. That was determined upon the principle that a clause of forfeiture in a lease, in case no sufficient distress be found on the premises, must be strictly pursued; and therefore it was held, that where a distress is to be made, every part of the premises must be searched, or the plaintiff must be nonsuited in an action of ejectment. The case in which that has been determined, is that of *Rees* on the dem. of *Powell v. King* (a) (his Lordship stated the facts of that case, and the result).

But the very point now before us has been already distinctly decided in the case of *Core v. Day* (b) (having also particularly adverted to that case, and the incidental *dicta* of Lord *Ellenborough* in course of the argument). On these grounds therefore, said his Lordship, I think this lease cannot be supported.

(a) Forrest. 19.

(b) 13 East, 118.

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It was contended at the bar, that the general clause for re-entry, which is afterwards inserted in the lease in question, is sufficient to satisfy the requisition of the power; but I cannot assent to that proposition, because it is a maxim of law that a subsequent general clause cannot affect a preceding special clause. To hold that proposition to be law would be to overturn all the doctrine in the books from the time of Lord *Coke* to the present day. In *Sheppard's Touchstone*, p. 85, s. 1. we find it laid down, that "if there be two clauses or parts of a deed repugnant, the one to the other, the first part shall be received, and the latter rejected, unless there be some special reason to the contrary." In the case of *Cotter v. Meyrick (a)*, Baron *Nicholas*, in answer to one of the objections, says "when there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand;" and in the case of *Thomas v. Howel (b)* we find it said by the Court—"But in deeds it was admitted, that subsequent clauses, which are general, shall be governed by precedent clauses, which are more particular." In *Altham's case (c)* it is recognized, as a rule or principle in law, that *generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa*; and further on it is observed to have been well said in 35 *Hen. VIII. Dyer* 56. that "subsequent words may qualify and abridge, but not destroy, the generality of the words precedent." And it was admitted, when this case was last ar-

(a) *Hardr.* 94.      (b) 4 *Mod.* 69.      (c) 8 *Co. Rep.* 154 (b).

gued by the counsel for the defendant, that Lord *Ellenborough* had intimated a strong opinion against the efficiency of that argument; and I am of opinion also, that that point affords no ground for supporting the lease, because the general clause cannot be considered as having the effect of completely nullifying the previous special power of re-entry.

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Another question raised in this case was, whether the former leases of the same property given in evidence were admissible in support of the validity of the lease in question, by shewing that it was conformable to them in respect of this clause. Upon that point I say, it is enough to shew that the power in the deed requires no such extrinsic means of explanation, because it is clear and precise, and has nothing ambiguous in it; and every man who reads it, with or without a legal mind, will find it clear and satisfactory in its tenor. It contains no reference to former leases, at least as to terms; and according to the authority of the Master of the Rolls, in the case of *Baynham v. Guy's Hospital* (a), they could not be used to explain the deed of settlement, by shewing, from the acts of the parties, what was their probable understanding upon it. In a subsequent case of *Eaton v. Lyon* (b) too, the same learned person held distinctly, that "a legal instrument is not to be construed by the acts of the parties." The same doctrine was acted upon in

(a) 3 Ves. 206.

(b) Ibid. 694.

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this Court in the case of *Iggulden v. May* (a); and it was also so decided in effect in the case of *Doe*, on the dem. of *Allan v. Calvert* (b), in which I was myself of counsel. In that case it was held, that the lease was void, because it was not conformable to the leasing power; notwithstanding it accorded with the custom of the country and with former leases which had been granted by the creator of the power. There was certainly no question raised in that case as to the admissibility of the evidence; but if the Court, where it had been admitted, refused to give it any effect, it was substantially the same thing as if they had refused to receive it. Without at all adverting to decided cases, however, I am of opinion, that on principle, no evidence can be admitted to explain a deed in any case, more particularly where the instrument is so plain and perspicuous as to exclude all ambiguity.

Upon the whole, therefore, I am of opinion, for the reasons which I have stated, that the judgment of the Court of *King's Bench* ought to be reversed.

WOOD, *Baron*—having stated the question and read the terms of the three powers, and noticed the distinctions in each, and the words of the proviso in the lease for re-entry, in case of non-payment of the rent for fifteen days, and no sufficient distress, thereby (as his Lordship observed)

(a) 2 N. R. 449.

(b) 2 East, 376.

engrafting upon the power the terms required by the statute of the 4th *Geo.* the II. c. 28.—proceeded as follows :

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It is contended on the part of the plaintiff, that the proviso for re-entry in the lease is not such an one as is required by the settlement, both inasmuch as it has limited a time for re-entry, which the settlement has not, and has thereby postponed the right of re-entry beyond the day on which the rent becomes due : and inasmuch as it is clogged with a condition that there be no sufficient distress on the premises, which the leasing power in the settlement does not mention ; and that therefore the lease is void.

The clause in the settlement, however, requires no more than that the lease should contain a power of re-entry for non-payment of rent, giving that power no qualification or modification at all. There is in the lease a clause of re-entry ; so that in terms the maker of lease has complied *literally* with the power given by the settlement. I admit, however, that the power, although it is general, must be executed not in an illusory manner, but in a reasonable manner, that is, in such a manner as the law will deem reasonable ; for I apprehend that the law will judge what is a reasonable execution of a power where no specific terms are expressed, as it will judge of the operation of the power itself. In the power of re-entry required to be inserted in the leases for the lands to be let at rack-rents, a time is limited  
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for the payment of the rent, and that time is twenty-eight days. That power, I admit, cannot be departed from. Why then, I ask, was no time for payment limited also in this power? unless it was because the settlor meant to leave it, as I conceive she has done, to the discretion of the tenant for life to insert such a reasonable power of re-entry as should secure the payment of the rent to the reversioner. Where the power dictates no precise terms, it is an inference of law that it must be executed in a reasonable manner; and the law will take notice whether it is executed in an illusory or in a reasonable manner. For instance, where one gives to another the power to appoint such portions of a bequest among his children as he shall think proper—if he should give the whole to one child, that would be an illusory manner of executing the will of the donor, and one which the law will not permit. So if in this case the power of re-entry were clogged with unreasonable qualifications, I admit it would not be well executed. The object of a clause of re-entry is merely to secure the rent; and it has always been considered as the only object of it, both at law and in equity; and when I see such a clause inserted here as is reasonable and fair, and which reasonably and fairly secures that object, under a power in an instrument where we are not tied down by any specific terms, I think the power well executed; for we are not to look out for what I conceive to be a mere *aper-juris* to defeat the intention of the parties; we ought so to construe deeds and acts *ut res magis valeat*

*valeat quam pereat.* In one of the cases cited on the part of the lessors of the plaintiff, the true principle on which these powers are to be construed, is, I think, rightly laid down. That is, the case of *Cothor v. Merrick* (a), which has also been referred to by my Brother *Park*, and was particularly relied upon in the argument. There the question—which was, whether a lease that had been executed by a tenant in tail was conformable to the powers of making leases by tenants in tail, which were granted by the statute of *Henry VIII.*, which was passed to enable tenants in tail to make leases to bind as if they were tenants in fee-simple—also arose upon a special verdict, which found that *Robert Earl of Essex* was seised in tail to him and the heirs male of the body of his grandfather, of the manor of *Pembroke*, and that he died seised; that his son entered, and made a lease by deed for twenty-one years to Sir *John Merrick*, rendering rent to the lessor, his heirs and assigns, and died; and after his death the estate tail descended upon one who was not heir at law to the lessor: and the question was, whether that was a good lease within the statute of 32 *Hen. VIII. c. 28.* to bind the issue in tail. By that statute, if a tenant in tail make a lease of the estate tail, provided such leases be not for more than twenty-one years, and provided that upon every such lease there be reserved yearly, and made payable to the lessors, *their heirs and successors to whom the said lands should have come after the death of the lessors,*

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(a) Hardr. 69.



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*if no such lease had been made, and to whom the reversion thereof shall appertain according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomedly yielded or paid," such leases shall be good in law.* In the case referred to, as the estate tail descended on a person who was not the heir at law of the lessor, and the rent was reserved to his heirs and assigns, so that there was not a rent reserved in terms to the persons who were to succeed to the estate after the death of the lessor, which certainly was departing from the power contained in the act of parliament; yet it was held a good lease. In that case Baron *Hill* says, "In the exposition of statutes, the Judges must make such a construction as to advance, and not to frustrate the intention of the makers. Now their intent was, that the rent should go along with the reversion, and the lease be good, if by any reasonable construction in law it might be so." So I say also, that in cases of powers reserved by settlement, we ought to do the same, if by any reasonable construction in law we can do so. Baron *Parker* also says, "It is the office of a Judge to preserve, and not to destroy an estate, if the exposition be not contrary to the words." Those, I conceive, are the true principles upon which we should construe all deeds. In that case the Judges gave a rational construction to the lease, and that operation to the act of the parties, which, in all probability, corresponded with their intention; although, in words, it was not according to the proviso contained in the act of parliament. Then taking the true interpretation of the power to be,

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to leave the mode of re-entry to the discretion of the lessor, the question will be, has that discretion not been in this instance fairly and *bond fide* and reasonably executed?

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The two points in this case arise on the time given for payment of the rent: and the absence of a sufficient distress upon the premises. As to the first, I consider, that by the operation of the first leasing power in the settlement, it is left to the lessor to insert, in his discretion, a reasonable proviso for re-entry, as in the other case he is tied down to twenty-eight days. Then is this a reasonable power in point of time, giving the tenant a period of fifteen days. In the next power, the period prescribed by the settlor is eight and twenty days, which is almost double the time; and if the parties thought that a reasonable time, then surely fifteen days must have been considered by them to be a reasonable time to be given to pay the rent. I lay no great stress on the finding of the jury (but I mention it, because I think it ought not to be entirely laid out of the question) that in the other leases of this property which had been executed, both before and after the deed of settlement, such has uniformly been the usual time given. It has been said, that we cannot look at those leases for the purpose of obtaining evidence of that fact; because it is contrary to the rules of evidence to explain a written instrument by extrinsic parol testimony. But it is not for that purpose that the leases have been made use of here: they have been used only for the purpose of shewing the manner in which these lands were

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usually let, and to ascertain the state of the property at the time when the new lease was made, with a view to accommodate to it the terms of the lease about to be prepared: and for that purpose and to shew that the lessor was acting *bond fide*, the former leases were, I think, properly used and admitted in evidence: and these same terms having been found there, I think that a fair criterion from which we may judge of the reasonableness of the proviso in that respect. In *Coke* upon *Littleton* (of Estates upon Condition) instances are put of conditions which were considered reasonable—one of them is, “if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year”(a), I only use this to shew what at that time was considered to be a reasonable proviso, and that the law will judge what is a reasonable time.

Then supposing this power to be reasonable in point of time, the consideration of the last objection arises; and that was the objection mainly, if not entirely relied upon. It is, that the right of re-entry has been clogged with the condition of there being no sufficient distress upon the premises. Upon that the question will be, is that also a reasonable condition to be inserted: and with reference to the law, as it stood when the lease was made, I am clearly of opinion, that it was perfectly reasonable. The statute of the 4th of *Geo.* the II. had, before the making of this settlement,

(a) Co. Litt. s. 325. p. 201 a.

considered

considered it to be reasonable, that lessors, where they had a power of re-entry for obtaining payment of the rent, should not enter whilst there was a sufficient distress on the premises. Where is the difficulty which that condition imposes? The rent reserved is 40*s.*; and can it be supposed that there would be any difficulty in finding a sufficient distress for 40*s.* upon this estate? They might not only take a sheep or a horse, but if they should go into the house, they would there find a table or chairs, or any article amounting to that value: it is therefore mere idle fancy to suggest that there would be any difficulty in finding a sufficient distress. • I will now advert to the statute of the 4th of *Geo.* the II., on which I wish that there had been more argument and consideration, as well in the case of *Coxe v. Day* as in the case before us. The date of this deed of settlement was in the year 1757, which was after the passing of that statute (for it passed in the year 1731) to regulate the powers of re-entry for non-payment of rent. Before that statute, the carrying into execution a power of re-entry, was attended with great difficulty and nicety. There must have been a demand of the rent upon the land. If there were a house upon premises demised, the rent must have been demanded at the fore-door, and it must have been demanded at a convenient time, before the sun-setting of the last day of payment, so that the money might be numbered and received. Then when the lessor had done all that, the law still required him to make an actual entry and bring an ejectment; and if all these things were not

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critically and exactly performed, the lessor lost the right of re-entry for that time, and he must have waited till other rent accrued, and then he must have made a fresh demand and re-entry for the subsequent rent. If the landlord, having complied with these formalities, had brought his ejectment, it was the uniform practice of the Courts of Equity to relieve the tenant against the forfeiture, upon payment of the rent and costs; for they considered the clause of re-entry as a mere security for the payment of rent. Landlords therefore being laid under such great difficulty, it was thought right to remedy that inconvenience; and therefore the legislature interfered: but at the same time that the legislature did remedy that inconvenience, it took care also to provide for the ease of the tenant; and therefore it said, that the landlord, in such a case, shall not avail himself of his power of re-entry, which was considered to be merely for the purpose of securing the rent, if he can be paid by distress upon the premises. Now this condition having been thought reasonable by the legislature, why should it not be thought reasonable by individuals, who are about to make a settlement in which the consideration of the subject arises. I think there can be no better test of the reason of the thing than what the legislature has provided in the very case. Then we have authority to shew, that it has always been considered that a power of re-entry is merely for securing the rent. In the case of *Wadman v. Calcraft* (a) a forfeiture

(a) 10 Ves. 68.

had been incurred by the non-payment of rent, and breach of other covenants. The Master of the Rolls, in giving judgment, made these observations, "The plaintiff seeks to be relieved against a forfeiture of the lease, which he states to have been incurred solely by the non-payment of rent; and if that is the ground of this ejectment, there is no doubt Equity will relieve against the forfeiture, *considering the purpose of the clause of re-entry to be only to secure the payment of rent; and that when the rent is paid, the end is obtained*: and therefore the landlord shall not be permitted to take advantage of the forfeiture." Before the statute of *Geo. II.* it was the same, and the only alteration which has been made by the statute is, in dispensing with the old formalities attending re-entries at the common law; and it has enacted, that the landlord having a right to re-enter, and when half a year's rent is in arrear, *shall and may* at once bring his ejectment and recover possession, *provided there is no sufficient distress to be found on the premises*, to countervail the arrears then due: and these are the very terms engrafted upon this proviso. The same statute has also provided, on behalf of the tenant, that he, in case of proceedings against him for rent by the landlord, he may pay or tender the rent and costs to the landlord or his attorney, or he may pay them into Court before trial, and that thereupon all the proceedings shall cease. The policy of this law, therefore, we see, was at once to prevent forfeiture for non-payment of rent on the one hand; and on the other, to facilitate the

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landlord's remedy for the recovery of it: and, at the same time, the legislature also thought it right to impose the same condition on the landlord as this lessor has done, that the tenant shall not be ejected if there be a sufficient distress to secure the rent. In this case there is secured to the landlord ample means for the recovery of his rent; he may bring his action or distrain the moment it becomes due, without waiting any time; and, if after the expiration of fifteen days, there be no sufficient distress upon the premises, then his right of re-entry attaches. It has been said, that the statute still leaves it open to the landlord, if he will comply with the formalities of demand at the last hour of the day, and make re-entry, in that case the necessity of distress is not imposed on him. The answer to that is, that the tenant would instantly be relieved in a Court of Equity against the forfeiture. I have hitherto made use of this statute to shew the reasonableness of engraving such conditions upon the power of re-entry required by the settlement; but it does not seem clear to me, that the statute has not shut the door against the proceeding by re-entry at the common law: and that is a point which I hope will be well considered if this case should come before parliament. If that be so *cadit quæstio*; because then the penners of this lease will have introduced nothing more into this clause than the law had in effect introduced; and I can have no doubt that they did consider that it was incumbent upon them to insert the same conditions as the statute had provided. I will now consider the ques-  
 tion,

tion, whether the landlord's right of re-entry at common law is not entirely shut out by the statute, which I think a fit question for the consideration of parliament. The act begins by reciting, that great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties which attend re-entries at common law; and forasmuch as when a legal re-entry is made, the landlord or lessor must be at the expence, charge, and delay of recovering in ejectment, before he can obtain the actual possession of the demised premises; and it often happens, that, after such a re-entry is made, the lessee or his assignee, upon one or more bills filed in a Court of Equity, not only holds out the lessor or landlord by an injunction for recovering the possession, but likewise pending the said suit do run much more in arrear, without giving any security for the rents due when the said re-entry was made, or which shall or do afterwards incur; for remedy whereof, be it enacted by the authority aforesaid, that *in all cases* (and I lay some stress upon this expression) between landlord and tenant, from and after the 24th day of *June*, 1731, as often as it shall happen that one half year's rent shall be in arrear (and here the rent is reserved half yearly) and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord and lessor *shall and may* (the words are not merely *may*, yet if it were *may*, I should still consider it imperative by analogy to a decision on another statute, which I shall

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shall presently advert to) "shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises," in the usual way, and that (it enacts) shall be equivalent to the formalities of a re-entry. Upon those words it is imperative, as it appears to me, that he shall not proceed as at common law, because the statute dispenses with that proceeding and abrogates it, and directs that instead he shall proceed in the usual manner by ejectment. The act then thus continues, "And in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the Court, where the said suit is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then and in every such case the lessor or lessors in ejectment shall recover judgment and execution in the same manner as if the rent had been legally demanded, and a re-entry made! But the lessor cannot re-enter in any case, unless there be an insufficiency of distress; and here the condition imposed upon him is only, that he shall not avail himself of the power of re-entry if there be sufficient distress. Then the statute also provides, on behalf of the tenant, that if he shall tender the rent due to the landlord, or pay it into Court with costs before the trial, the proceedings in the ejectment shall cease. I think, therefore,

therefore, that by the statute the power of re-entry at common law is taken away. Why should it be left? It is quite nonsense to suppose that it can be left for any thing, but as a security for the payment of the rent; because if the lessor would make a re-entry at the common law, while he might find goods to distrain, the defendant might have filed a bill in Equity to restrain him. And now neither Law nor Equity will permit the lessor, since the statute of 4th *Geo.* II., to take any proceedings on non-payment of rent for any other purpose save the recovery of the rent, and the right of re-entry is regarded merely as a security for the rent. Now it appears to me, that that is the reasonable, fair, and liberal construction of the statute; for why should there be left a loop hole for the landlord to make an entry at common law, in order to avoid the remedial enactments of this statute? The intention of the act was, that the lessor should have the same relief in a Court of Law as he might before have had in a Court of Equity. It strikes me therefore that it is imperative upon the party to proceed in the way which shall enable him to avail himself of this act, and in that way only; and I apprehend that it always has been so considered: for there will not be found, since this statute, an instance of a re-entry at common law. I, at least, have never heard nor read of such an instance: and I think the construction which the Courts have put upon the statute of the 8th & 9th of *Wm.* III. c. 11. confirms me in the opinion, that this statute is also imperative. That statute is entitled "An act for  
the

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the better preventing frivolous and vexatious suits." The 8th section of that statute, which relates to actions for penalties for not performing covenants and agreements, runs in these terms, " And be it enacted, that in all actions which from and after the 25th day of *March*, 1697, shall be commenced or prosecuted in any of His Majesty's Courts of Record, upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs *may* (not shall and may, as it is in the 4th *Geo. II.*) assign as many breaches as he or they shall think fit; and the jury upon the trial of such action shall and may (now using both words) assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken; and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions." It is provided also, that if judgment shall be given for the plaintiff on a demurrer, or by confession or *nihil dicit*, he *may* (again) suggest as many breaches of the covenants as he shall think fit; upon which there shall be a writ of enquiry: and if the defendant after such judgment and before execution executed shall pay into Court to the use of the plaintiff the damages assessed, by reason of the breaches of covenant, with costs, *a stay of execution* shall be entered upon record, or if damages shall have been levied under the execution, the defendant shall be discharged from the

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the execution, the judgment to remain as a security to answer any further breaches, and the plaintiff may have a *scire facias* on the judgment suggesting other breaches. Now I well remember the first case where the construction of the word "may," in that statute, was brought into consideration. That was the case of *Drage v. Brand(a)*. Until that time it had always been considered to be, in the option of the plaintiff, whether he would proceed according to the course of the common law, or under this statute; and therefore in general he assigned only one breach. In *Drage v. Brand*, however, that came to be considered. It was there contended, that it was not compulsory on the plaintiff to assign breaches, and that he had right to elect to proceed at the common law, and not upon this statute: and it was argued very much, upon the ground, that the statute was made for the benefit of plaintiffs, and that, as it says the plaintiff *may* assign as many breaches as he should think fit, he might waive it, and leave the defendant to his remedy in Equity, having an election either to proceed upon the statute, or according to the course of the common law. The Court, however, in its construction of that statute, in the case I have referred to, held, and all the Courts in *Westminster Hall* now hold, that the statute is compulsory on the plaintiff to assign breaches and assess damages, and that the defendant shall not be put to seek relief in Equity. And that, I think, is the fair and liberal and proper construction to be put upon that

(a) 2 Wils. 377.

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remedial statute, or the result would be, that a plaintiff would be entitled on a verdict to take out execution for the whole penalty and costs, and the defendant would be driven into a Court of Equity for relief, when an issue must necessarily be directed. To prevent that circuitry it is, that the statute has been considered in legal construction to be compulsory, and as enacting virtually that the plaintiff *shall* assign breaches and assess damages. The same question was so determined also in the case of *Roles v. Rosewell* (a) some time afterwards. I say, therefore, that by analogy to this statute, the true and real construction of the statute of the 4th *Geo.* the II. also is, that it is compulsory, and upon the same principle, (indeed the *words* are much stronger in this latter act) and that the power of re-entry at common law is abolished, and the landlord *must* proceed in the way thereby prescribed, by serving an ejectment at the end of half a year, and cannot proceed in any other way. If I am right in the construction of that statute, and there is certainly no decision to the contrary, there is an end of this question; for the penners of this lease have by introducing these conditions inserted nothing as a qualification of the power of re-entry, which is not conformable to that statute. But I will suppose it to be still left open to the landlord to proceed as he might have done before the statute: in that case I would use it to shew that a reasonable clause of re-entry being all that the power required, the adoption of the same condition,

(a) 5 T. R. 538.

which

which the legislature has adopted in similar cases, cannot be considered as unreasonable. It might not perhaps be necessary to express the condition, because the law imposes it; but being expressed *superflua non nocent*.

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The case of *Coxe v. Day* has been cited as an authority of the Court of *King's Bench* establishing, that the inserting in a condition of re-entry in a lease made under a power, the words, "in case no sufficient distress can be taken upon the premises," (those words not being in the power) was not a good execution of the power. I doubt very much the propriety of that decision. I think the operation and effect of the statute of the 4th of *Geo.* the II. c. 28. was not sufficiently brought before and considered by the Court in that case; but, be that as it may, it is different in one very material feature from the present. The re-entry required there was for non-payment of the rent reserved by the space of twenty-one days; so that there was there a specification of a particular mode; and therefore it might perhaps be inferred, that no other qualification would be warranted; but here there is no condition specified nor time limited. "A power of re-entry," generally, is all which is required; and therefore I consider that reasonable qualifications may be added. In the case of *Doe, dem. Forster v. Wandlass* (a), it was determined, that a landlord could not recover in ejectment, where there was a sufficient distress, and he had not complied

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with the requisitions of the common law. In this present case, which was only a few years ago, the same Court of *King's Bench* also must have considered it as distinguishable from that of *Coxe v. Day*; or that upon re-consideration their former decision was wrong; for it cannot be supposed that they had forgotten their own decision of a few years before, when the same Chief Justice and one of the present Judges sat on the bench in both cases. They held that this power has been reasonably and properly executed, and they have accordingly given judgment for the defendant: and I am of opinion that it was a right judgment, and that it ought therefore to be affirmed.

GRAHAM, *Baron*—having stated the nature of the question, and observed that it depended on the first of the three leasing powers contained in the settlement, applicable to three distinct dispositions of the property, the terms of which, as well as of the proviso for re-entry and other material parts of the lease, he read at the commencement, remarking the distinctions occurring in the terms of the three powers, in each of which (he observed) the creator of them had been more or less minute in her care of providing for the preservation of the interest of the remainder-man, in proportion to the amount of rent to be reserved—delivered his judgment to the following effect:

With regard to those demises of the property which the tenant for life was empowered to grant  
for

for lives or long terms depending on lives, and on which fines were permitted to be taken, the settlor is manifestly more indifferent in her provisions; for she expresses less anxiety about the precise terms by which the rents reserved under the first power, where the lessor is entitled to take premiums, are to be secured: and that is probably because those fines, which are a species of anticipated rent, constitute the substantial enjoyment and income of the tenant for life; and the reserved rent is merely nominal and intended only to establish a recognition of the relation of landlord and tenant; for as to any beneficial enjoyment a rent of two pounds may be treated in the present discussion as a rent of two shillings. As to that she only requires that the leases shall contain a power of re-entry, in general terms, so general that nothing definite can be extracted from them, nor can the very words be followed on that account; and it must therefore necessarily refer to something extrinsic. It cannot be executed without such reference to something that had before been done with respect to the property on similar occasions; or she has left it altogether to the judgment and the discretion of the person who might have to execute the power. There is a very important fact found among the circumstances of this special case, which, although I do not mean to rest my judgment on it, I cannot but consider most material for our consideration. At the time of making this settlement, and so long afterwards as till the year 1808, the then subsisting leases contained a similar proviso,

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couched in the terms of that which is contained in this lease. Now what could be more natural than that any person, who should have to pen a lease by which he was to reduce into practice this general power, should have recourse to such subsisting leases to serve him as a guide in ascertaining the customary and usual mode of leasing, to direct him in his endeavour to execute the power as conformably to the requisition of the settlor as might be? All that she has required is, that there is to be a power of re-entry for non-payment of rent. But what power? Such an one as should be reasonable and proper. Would it be reasonable or proper so to bind down the tenant, that, upon his failure to pay this rent before the last moment of the day on which it is reserved, the landlord might instantly re-enter? Those are terms which any man taking a lease would revolt from and reject, as being terms which must drive him into a Court of Equity for relief on every occasion; and they would also subject the landlord to all the inconveniences attending a re-entry at common law. It has been objected, that, if it should be admitted that some time may be given, a difficulty would arise in ascertaining what time; and it has been asked (for that difficulty has occurred to very intelligent minds) who is to judge of the reasonableness of such time? A Judge or Jury? I answer neither, certainly. It must be in the discretion of the person who is to execute the power. It is he, who necessarily is, in the first instance, to embody in a specific shape this general requisition of the creator of the power, that

that the lease contain a power of re-entry; and the Court would in a case of dispute have ultimately to determine whether he has followed the intention of the settlor. I do not say that the insertion of every power of re-entry will satisfy the leasing power in the settlement; for it must be such a power of re-entry as would be reasonable either with regard to what had been formerly adopted in the earlier enjoyment of the property, or to what would be commensurate with any occasion that might arise for departing from the former usage. Here then we may apply the doctrine, now universally admitted, that clauses of re-entry are regarded both at Law and in Equity, as only having for their object to secure the payment of rent; and therefore a power of re-entry, modelled on the law, cannot but be considered reasonable and suitable to every occasion. That was the doctrine in Equity before the statute. It is however material for us to consider, that when this settlement was made, the statute of 4th of *Geo. II.* had passed; and therefore the maker of this lease, in executing the power, had then not only the principles of Equity, but the rule of this statute for his guide. I take it to be a clear proposition, after a very long experience in Courts of Equity, and I state it in the hearing of those who can correct me if I am wrong, that whatever may be the form of these clauses, whether they express that the lessor may re-enter for non-payment of rent, or that the lease shall be void in such case, or whatever other form they pursue; if the lessor had re-entered for breach

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of that covenant, a Court of Equity would have at all times restrained him from proceeding further at law, on the lessees paying the arrears of rent and costs; for such clauses (which were originally founded on the old doctrine of estates upon condition) operate as a forfeiture, and it ever has been the peculiar province of Courts of Equity to relieve from the forfeiture, whenever the rent should be satisfied. The legislature however considering it hard that a tenant should be put to the expence of coming to a Court of Equity to be relieved from the consequence of non-payment of, perhaps, a mere nominal rent of two-pence (for I may for this purpose assume this 2*l.* to be no more), have therefore provided a more summary course. They however also considered, at the same time, the hardships under which landlords laboured, from the necessity of observing all the formalities of re-entry at common law which they were often liable to mistake, and, their observance being traversable, they frequently failed to recover; and therefore the legislature provides, that the lessor shall be entitled to re-enter without observing any such formalities; but that is provided only in case there be no sufficient distress upon the premises; for if by looking over the next hedge he can see abundant means of satisfying himself the arrears of rent, the statute says he shall not turn the tenant out, nor drive him to a Court of Equity for relief. Looking then to the provisions of this statute and the established course of the law, could any man of sense take any better guide for the framing of the clause

clause of re-entry, required in general terms by this leasing power, than the conditions which this statute imposed on landlords, when it conferred on them the advantage of taking away the difficulties attending their common law remedy by re-entry. Can we conceive that the settlor meant, that for a sum of one pound, the amount of one half year's nominal rent, there might be an actual re-entry made, when, by merely looking over the hedge, the landlord would most probably see a hundred head of cattle on which he might distrain? Where then is the difficulty or clog imposed by this qualification on the remainder-man? The very nature of this tenure, too, is a strong argument against the supposition that the creator of the power intended that there should be an absolute peremptory power to re-enter the instant the rent should be due and unpaid; because we know that under such leases as this the lessee is the owner for the duration of his term of the property; and he pays a great sum for it in the shape of a consideration for his lease. It surprised me, therefore, to hear it seriously argued in a case of a lessee who is, as it were, a purchaser for a valuable consideration, that great dangers and difficulties might attend a suit in replevin. Can it be really supposed that a tenant who buys the estate for three lives, and has so valuable an interest, would resist the payment of a rent of 20s., and replevy the goods distrained, at the great expence of such a proceeding? So, with respect to the supposed hardship of searching every part of the premises for a distress, can it be supposed that these estates can ever be in

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that destitute condition, that the lessor must be obliged to search for distrainable goods every part of a farm, where he may be sure to find a dung-heap in any corner which would pay him his one pound. These are arguments which, in my judgment, ought not to have any weight with liberal and intelligent minds. Another argument was used, and with that I perfectly agree, that by no mode of executing this power ought the remainder-man to suffer any injury, or be put in a worse condition. That is very true; but we are also to bear in mind that these powers, which have been transferred from Equity into the Law, are therefore always to receive an equitable and liberal construction, so as neither to work an injury to the tenant, or to the person next entitled in remainder or reversion to the rent reserved. But let me ask, what possible injury can that person suffer under the power as it has been executed in this instance? Will it be said that it would better his condition to have reserved to him a power of re-entry at common law for this rent of one pound, such as the literal execution of this power, under which it has been said he ought to have had that right reserved, would give him, instead of this beneficial and easy power of re-entry which has been provided for him by analogy to the statute, enabling him upon the non-payment of the one pound rent, if he can wait for the space of half a year, to proceed to get possession by the easy remedy of ejectment (if indeed it could be supposed that there should be no sufficient distress on the premises) by which the old common law difficulties are at once obviated?

Then

Then we were pressed with authorities against the admissibility of such a condition to relax the right of re-entry, the principal of which was the case of *Core v. Day*. I, by no means, admit that that case has decided the point for which it has been cited in argument; for if it had, I might then concur with my Brother *Wood*, who shewed some little disposition to differ with that case. But it is not necessary for me to express any opinion on the propriety of that decision; because I think it distinguishable from this. That was not a case of an estate for lives at a nominal rent, and I know, from a note\* of the case of *Hotley v. Scot* (a), with which I have been furnished,

(a) *Lofft. 316.*

\* Lord TANKERVILLE v. WINGFIELD and PRITCHARD,† transcribed from the MS. note in the possession of Mr. *Butler*.

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M. T. 13 Geo. 3.

Upon ejectment the case was as follows:—Upon the marriage of Sir *John Astley*, his lady's estate was settled upon Sir *John* for life, with several remainders over which never took effect; remainder to the lady's right heirs. A power of leasing was given to Sir *John*; such leases to be made for any number of years at the accustomed rent, to take effect immediately in possession, and not by way of future or reversionary interest; and on every such lease there was to be inserted a clause of re-entry if the rent should be behind for twenty-one days, the rent to be made payable, and the re-entry to be incident to, and to go along with the reversion or remainder. In the same settlement there was also a power of revoking all the uses thereby declared, and appointing new.

Some time after the marriage, Sir *John Astley* and his lady revoked all the uses of the settlement that were subsequent

† This is the same case as is reported in *Lofft. 316*, under the name of *Hotley v. Scot*.

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nished, that that case bears me out in this. The note I speak of, although not very fully taken, enables

to Sir *John's* life estate and the powers incident thereto, and declared new uses: there was also a fine levied to the same effect.

21st September, 1766, Sir *John* made two several leases of this date to the two defendants *Wingfield* and *Pritchard* for twenty-one years, conformable to the power he had by the said settlement and the other deeds, and the fine, except, that previous to the entry, distress was to be made; and it ran nearly in the following words:—That if the rent should be behind or unpaid by the space of twenty-one days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises (except as therein is excepted), then it should be lawful to Sir *John Astley*, his heirs and assigns, to enter.

Sir *John Astley* and his lady being both deceased, the estates are descended upon Lord *Tankerville*, the plaintiff, &c.

*Dunning* for the plaintiff. The Court always takes a difference between powers when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate, or which he holds in another's right. The first are always construed favorably to the persons making use of this power; the second are taken in a strict light. Here it was certainly the second. It was a power to be exercised on the wife's estate, and in some respect in prejudice of his wife, and therefore to be taken strictly.

1st objection. That the settlement declares that the power of re-entry should be reserved and made incident to the inheritance of the estate, and by the lease it is reserved to Sir *John Astley*, his heirs and assigns. 2d objection. The settlement directs the re-entry so to be reserved as above to be made immediately, if the rent should be behind by twenty-one days. By the lease it is to be preceded by demand and distress.

These are strong, plain, and conclusive objections.

*Bearcroft*

enables me to perceive what the ground of the decision was; and that case diametrically opposes what

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*Bearcroft* for the defendants. The remainder-man Lord *Tankerville* has substantially all the powers he ought to have, or can have. As to the 1st objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident: the heirs and assigns of Sir *John Astley* mean those who are heirs and assigns to the estate under the settlement by which Sir *John Astley* claims the estate so. *Cotter v. Merrick*, Hardr. 89. Tenant in tail died seised, his son entered and made a lease for twenty-one years, rendering rent during the term to the lessor, his heirs and assigns, and died. It was unanimously adjudged to be a good lease and within the 32 Hen. VIII., the opinion of the Court being, that the word "heirs" being a comprehensive word, it ought to be construed *secundum subjectam materiam*, and to have that which the nature of the deed requires. This is much the stronger in the present case, as Sir *John Astley* having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may in some respect be said to be the heirs and assigns of Sir *John Astley*. As to the 2d objection, that the re-entry which is directed by the power in the settlement to be reserved immediately on the rent being behind twenty-one days after it is due, is by the lease to be preceded by distress and by demand. The words on the settlement are short and loose, and seem to be no more than a general direction, that in every lease to be made under this power there should be a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry. It is a direction that the power of re-entry usually inserted in leases should be inserted in the leases to be made under this power in the usual manner. This, I apprehend, a sufficient answer to the objections raised against these leases, each is a verbal objection, and I have given each a verbal answer.

Mr. *Dunning* in reply.—The distinction I set out with, and the consequences of that distinction that these leases are to be considered in a strict light is not denied, and besides this claim to the favor of the Court, Lord *Tankerville* has that of being



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what was said at the bar to be the doctrine deducible from the case of *Coxe v. Day*; so that we may

being the heir at law of the owner of the estate on which this power has been exercised. Lord *Tankerville* is neither the heir nor the assignee of *Sir John Astley*; he claims by a title paramount to *Sir John*. The rent is directed by the settlement to be incident to the inheritance, that is to say, to be to the several limitees of the settlement when respectively in possession. The reservation is to the heirs and assigns of *Sir John Astley*. They are not limitees. This is therefore not a proper execution of the power. The case quoted, and the act of parliament 32 *Hen. VIII.* only shew, that if a tenant in tail makes a lease according to the statute, and reserves rent to himself and his heirs, the word "heirs," or the words "heirs and assigns" may be construed to be such heirs as may succeed by force of the entail. This construction can never, in the present case, take in Lord *Tankerville*, who cannot in any sense or meaning whatever be deemed the heir of *Sir John Astley* or his assigns. It is sufficient to say, that in pleading he could never be described as such. As to the words being loose, and directing what should be done, and not describing how it is to be done, this seems a frivolous distinction. The settlement directs a clause of re-entry to be inserted in the lease; the lease says it shall not be lawful for *Sir John Astley* to enter as long as there is a sufficient distress or distresses to be taken. Till then it is postponed. This is contrary to the words of the settlement, and is not certainly a proper execution of the power.

LORD MANSFIELD.—The two objections to these leases, are, 1st. that by the settlement the re-entry is to be made incident to the rent, but by the lease it is reserved to *Sir John Astley*, his heirs and assigns. And in the event it has not followed the rent, but gone to the heirs of the lessor *Sir John Astley*, while Lord *Tankerville* is in the lawful possession and receipt of the rents. The 2d objection is, that the clause of re-entry, which by the settlement ought to be immediate, is by the lease fettered, being on a previous demand and previous distress. As to the first, by the nature of the power it must go with the reversion and inheritance. The person who is in the reversion and inheritance, is he that is to enter on

may say, in this case, *magno se judice quisque tuctur*. I however am of opinion, that the doctrine assumed in the argument to be established by the authority of *Coxe v. Day* would be contrary to law and (I had almost said) to common sense: and when I consider the great reputation of the Judges of whom the Court was composed, when the case of *Hotley v. Scot* was determined (my Lord *Mansfield* and Mr. Justice *Aston* being then on the Bench), it is, in my estimation, of the highest authority; and it decided the very point in dispute. In the argument Mr. *Dunning* mainly relied on the objections of the introduction of qualifications similar to those now objected to, and Mr. *Bearcroft* treats them as verbal objections, contending, that they are the usual qualifications, and such as are inserted in all leases, and

on the forfeiture of the lease, and no one can enter but he to whom the rent is payable; for, as *Littleton* says, no stranger can enter for forfeiture; for a stranger cannot be in by his former estate. If the rent had been reserved for the term, as in the case cited from *Hardres*, still it goes with the inheritance. Heirs and assigns can only mean those who have the reversion and inheritance, otherwise, as is said 2 *Saund.* 370. they would be words of surplusage. The clause of re-entry must go with the inheritance the same as the rent; for it cannot be reserved to any body but to him who is seised of the inheritance. It was said that ought to have been worded to the person next in reversion or remainder. The words "heirs and assigns" are general words, and are as good and quite tantamount to particular words. As to the second, the clause of re-entry is short with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress. Therefore, in both points, we agree to support the leases, so the verdict must be entered for the defendants.

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 and others

are productive of no injury to the lessee. The principles of the reasoning of Lord *Mansfield* I think I can collect from the report, although his precise expressions might have been mistaken by the gentleman who took the note, who was then a very young man; but the ultimate decision of Lord *Mansfield* could not have been mistaken. The ground of that decision was, that the reason of inserting the clause of re-entry being merely to secure the payment of the rent, whatever was adequate to that purpose and occasion was sufficient; and that it would be contrary to the spirit of the statute, and contrary to reason, that the lessor should enter for the non-payment of the rent whilst there should be a sufficient distress. It should be observed, that the rent there was a beneficial rent and not merely nominal as this is. Even in that case Lord *Mansfield* held, that the qualifications were no more than what was reasonable and proper; and therefore his Lordship and all the Court held the lease to be a valid execution of the power. Having expressed myself so fully upon that case, I shall not enter into any depth of learning on the point, whether the extrinsic evidence was properly admitted in this case; because my opinion is grounded upon the conviction that this clause of re-entry is proper and fully adapted to the occasion, which was, that it should be a security for the payment of the rent. Without agreeing implicitly with the suggestion of my Brother *Wood*, that the statute of the 4th of Geo. II. c. 28. has precluded every other mode of proceeding, I consider that it is quite enough for

for my purpose, that it affords a fit criterion of judging of the sufficiency of this power of re-entry. The lessor wisely and properly takes that statute as his guide; and in effect the proviso so qualified puts the remainder-man in a better situation; because the power to be strictly construed would have left him to his intricate remedy at common law; whereas the other and more reasonable execution of it gives him the beneficial remedy with which he had been furnished by the statute. Were it necessary however to decide the point I should not fear to say that the extrinsic evidence was well referred to; but I wish to stand upon the higher ground that there is here nothing of *ambiguitas*, either *patens* or *latens*; but inasmuch as in the language of the deed, which is sufficiently clear in sense, there is nothing definite or precise in the way of direction, it being general and indefinite in that respect, referring to judgment and discretion to be exercised in the execution of the power according to the requisition, I therefore think the existing leases were properly resorted to as a guide to that discretion and judgment by examining how the estates had been previously managed, and the prior practice as to the mode of demising which had obtained at the time of the making of the settlement. If therefore there be any ambiguity at all in the deed, it is an *ambiguitas patens*, which, it is said, cannot be holpen by averment; but I am of opinion that there is no ambiguity here. I need not therefore advert to the doubt thrown on the doctrine in *Cooke v. Booth* by the decisions,

1812.

Don, dem.  
Earl Jernsey  
and others  
v.  
Sutton  
and others.

1819.

DOE, dem.  
Earl JERSEY  
and others

v.  
SMITH  
and others.

decisions, that where parties have used express language, the conduct of the same persons or other evidence *aliunde* cannot be admitted to explain their meaning: and I am relieved from that difficulty here; because, in the case of *Cooke v. Booth* there were express covenants, which in their language imported an agreement for a perpetual renewal, and it is the generality of the power here which we are to supply. But covenants which, according to the plain sense of the words on the face of the deed itself express or may be construed to express an agreement for a perpetual renewal, certainly cannot receive explanation *aliunde*, as by the construction which the persons executing the successive leases, and their lessees had put upon it by more qualified covenants, so as to exclude the effect of that by which they had covenanted for a further renewal.

The cases which have been cited by my Brother *Park*, are, I think, very distinguishable in their circumstances: and the doctrine which they establish, therefore cannot be applied to the present question so as to decide the point. On the whole I think the judgment of the *King's Bench* was right, and ought to be affirmed.

*RICHARDS*, Lord Chief Baron (having expressed a desire to give his opinion, independently of any feeling excited either way by the difference of opinion on the Bench) stated the question, and continued as follows:—

If we should hold the lease to be according to  
the

the power, and a good execution of it, there would be at once an end of the question; for its validity would be thereby established: if not it is void. If it should be held to be void, we get rid of one of the strong arguments of a very learned person; because, in that case, the statute of the 4 *Geo. II.* would have no application as affecting this lease, inasmuch as the operation of that act only attaches on existing leases in force. So that notwithstanding that statute, and notwithstanding any relief which Courts of Equity would possibly afford in cases where equitable proceedings might be instituted for the purpose of obtaining the interference of such a Court, under these circumstances; (for with any such speculation we have here at present nothing to do, as no such proceedings have been resorted to) we must come back to the plain question on which this case depends—whether this demise has been made in due execution of the power to lease given by the settlement?

There cannot, I think, be said to be hitherto any complete uncontradicted decision on the subject. With respect to the qualification by the enlargement of the time, I know of no case: and with respect to the introduction of the other qualification requiring that there must be an insufficiency of distress on the premises, we find on that point the conflicting cases of *Hotley v. Scot* and *Cove v. Day*; and there is also the decision in this case now under consideration, in opposition to that of *Hotley v. Scot*. It therefore becomes extremely

1819.

Doz, dem.  
Earl JERSEY  
and others  
v.  
SMITH  
and others.

1810.

Don, dem.  
Earl JENSEY  
and others  
v.  
SMITH  
and others.

extremely important to consider this hitherto undecided question—as being, in the absence of authority, one of the first impression—with great care and circumspection.

Before I state the situation of the parties to this settlement and the various provisions of the deed, on which the whole turns; I must observe that it is now perfectly established, that the principal thing to be attended to, in construing powers of every description, is the intention of the creator of the power; for he is the legislator in every particular case, and may impose, arbitrarily, whatever terms he pleases, provided they are not inconsistent with the known rules of law. It is the duty of Judges not to speculate beyond that intention and its legality: and it is not their province to examine whether the terms, expressly required to be imposed by the creator of the power, are reasonable or unreasonable. Their only province is to see that they be not contrary to law, and if not, they must execute the intention of the parties. In this case, that intention is to be gathered wholly from the situation of the parties at the time of executing the settlement and a careful consideration of the terms of the instrument itself. The daughter of Lord *Mansel* may be considered as having the absolute dominion over this property, when her father, who had given it to her for life, with a power of appointment in fee, died. She afterwards executed that power by making this settlement on her marriage, and she thereby appointed these estates, which were then so entirely subject

to

to her disposition and control, in the following manner; limiting them to the use of her husband Lord *Vernon* for life; with remainder to herself for life; remainder to the children of the marriage: then to such persons as she should by *will* (not by deed) appoint; with remainder, or reversion rather, to herself and her heirs and assigns for ever. So that, with the exception of the intermediate estates limited to Lord *Vernon* for life, and to the issue, she reserves to herself the entire dominion over the property, and subjects it to her own sole disposition. The deed of settlement then creates three different powers of leasing adapted to give different interests to the lessees. Those powers were to be executed by Lord *Vernon* and herself respectively, as either of them should successively come into possession; and accordingly Lord *Vernon*, when he became tenant for life of the estate in question, made the lease now under consideration, by virtue of this power of leasing, which power moved wholly from Miss *Mansel*, and was given by her under the terms of her deed of appointment. I state this the more particularly because a distinction has been sometimes taken in the exposition of leasing powers, between those which are to be executed by persons having estates with such powers originally moving from themselves, and persons whose power over the property has been originally derived from others; and it has been thought that less latitude is to be allowed in the former case than in the latter; but it is not my intention now to consider whether that distinction is well or ill founded. Our most material

1819.

DoP, dem.  
Earl JERSEY  
and others  
v.  
SMITH  
and others.



1819.

Doz, dem.  
Earl JERSEY  
and others  
v.  
SMITH  
and others.

object is to examine minutely the nature and terms of each of these three powers; for by those alone can we be enabled to decide on the validity of the lease now under consideration: and I shall first take that which respects the mines, although that is not a subject of the present question. [His Lordship stated it in terms, observing, that there no power of re-entry is required; he then stated the words of the second power of leasing for terms of years not exceeding twenty-one, and the clause requiring the insertion of a power of re-entry.] Now the power to lease the mines does not require that a right of re-entry should be reserved for the non-payment of the rent at any particular time; but in the second power there is a clause requiring a power of re-entry to be reserved, provided the rent be unpaid twenty-eight days after the time appointed for the payment of it. The creator of the powers, therefore, has expressly declared the law on the subject in the latter case, by declaring it to be her intention that there shall be contained in such leases a clause of re-entry if the rent be unpaid for twenty-eight days: so that upon that event happening, the lessor or reversioner is to be absolutely entitled to enter. The tenant for life, therefore, is not at liberty to introduce into leases under *that* power, any other terms less favourable to the reversioner who is as much a purchaser of his reversion, as the lessee is of his interest, than those prescribed; and the reversioner is to be favoured, at least equally with the lessee who must be presumed to have knowledge of the title of the lessor under whom he

he takes, and into which it is his duty to enquire; while the reversioner on the other hand—although (as I have observed) he is as much a purchaser as the lessee, yet as he acquires his interest in the estate by a deed of appointment to which he is no party—must necessarily be taken to be a stranger to the title which he has no such opportunity or right to examine. In neither of those powers to lease at rack-rent is there to be any fine, premium, or foregift taken; so that the tenant for life is to have no greater advantage than the reversioner upon those leases. He has only been empowered thereby to grant leases for a number of years certain; and as they may endure beyond his own life, for which period he might have granted leases without any power; perhaps a lease for a given number of years may be thought more beneficial to him than a lease made to endure for the uncertain term of his own life. The other (the first) power, however, which is that, the construction of which is now brought under our consideration, is quite different in its terms. [Here his Lordship read that power, as in page 284, ante.] Under this power the tenant for life is given a right to take as great a fine, premium, or foregift as he can obtain; and that is a privilege which naturally must operate to the disadvantage of the reversioner; because, if the term be not out until after the death of the tenant for life, the reversioner has nothing but the ancient accustomed rent; and therefore it is not extraordinary that the creator of that power should be desirous of protecting the reversioner who might be her

1819.

Doc, dem.  
Earl Jersey  
and others  
v.  
Smith  
and others.

1819.

Don, dem.  
 Earl JESSEY  
 and others  
 v.  
 SMITH  
 and others.

child (though any appointee would probably be entitled to be considered, in such a case, an object of her greater care) by requiring more efficient restrictions to be inserted, in order to protect him from the effect of this sort of lease, than in the other cases; for this would raise a question of right as between the tenant for life and the reversioner; because the lessee has a right to cover himself from consequences by taking appropriate covenants from the lessor, on which he would be entitled to recover a compensation from his assets, in case of any breach of the covenant that he has power to demise. So that while the lessee may be really, in any event, protected, the reversioner may be injured if the terms of the power are not strictly pursued.

On the 5th of *September*, 1803, Lord *Vernon* granted this lease of the premises which are the subject of the present action for ninety-nine years, if three lives should so long endure, at the yearly rent of 2*l*. I do not think it necessary to dwell upon the *quantum* of the rent, for the principle of construction to be applied to it must be the same, whatever the amount may be. That rent which is found to be the ancient and accustomed rent, is reserved payable at *Michaelmas* and *Lady-day* in every year. Then after the covenant to pay the rent, it is provided in the lease that if the rent shall be unpaid by the space of fifteen days, and no sufficient distress be on the premises, it shall be lawful for the lessor to enter and possess the premises, free from the lease.


Now

Now the question is not merely whether this clause is conformable to the words of the first power, contained in the settlement, to demise the property of Lady *Vernon* for lives or years determinable on lives; for beyond all question it is not; but it is in effect whether any latitude of construction can be admitted in a case of this sort, so as to let in the whole of the terms of the proviso in the lease, as it stands, and render it constructively consistent, with the requisition of the leasing power. In looking into an instrument, with a view to learn the intention of the parties, the examination must be made with reference only to the instrument itself, and no cognizance can be taken of extrinsic matter not expressly referred to. It has been argued at the Bar, that, as the settlement only requires a power of re-entry, it must be taken that the settlor meant to require only such a power as is reasonable; and that any power of re-entry might be inserted which should be qualified by reasonable conditions: and it is said, that as there is, in fact, a power of re-entry reserved in the lease, the terms of the requisition in the power of leasing are satisfied, notwithstanding there are conditions added in restraint of that power; because those conditions are reasonable. The objection to that unsatisfactory and imperfect compliance is, that no one can be entitled to judge of the reasonableness of the qualifications which the tenant for life may choose to introduce. Who is to decide it? a Judge or a Jury? or is the tenant for life to be the arbiter of it? It surely can-

1819.

DOE, dem.  
 Earl JENSEN  
 and others  
 v.  
 SMITH  
 and others.

1819.

  
 DOR, dem.  
 Earl JERSEY  
 and others  
 v.  
 SMITH  
 and others.

not be supposed, that the author of this settlement, when she created this power to lease in the words which she has used, meant that the tenant for life might qualify the right of re-entry directed to be reserved, in any manner he pleased. That would be most absurd; for by introducing correspondent qualifications, he might, in effect, lease out the whole fee.


I am sorry to say that I do not feel the weight of the argument, which was founded upon the use of the indefinite article in this power; for I do not see in what respect the word "*the*" would have been more useful, significant, or conclusive than this word "*a*," or in what respect the use of the indefinite article has altered the meaning, at least so as to have given greater efficacy to the import of the terms of the power, in favor of the person who was to exercise it, than the definite article could have done. Passing that over, therefore, thus lightly, I return to the real subject-matter of contest—the conformity of the proviso with the power. [His Lordship then stated the words of the proviso in the lease, and of the power.] The objection to that proviso is two-fold—first, because by the covenant, the power of re-entry is not given *on* the non-payment of the rent, but at a certain period after, namely, fifteen days: and secondly, because the reversioner cannot even then enter, if there should be a sufficient distress on the premises. If either of these objections should prevail, it must be fatal to the title of the defendant in error. I shall  
 avoid

avoid saying any thing decisively either way, as to whether such an enlargement of time alone would be destructive of this lease. I have, certainly, very considerable doubt upon that point; for there may be something in the notion which appears to prevail, that that condition would be nothing more than what would be reasonable in so relaxing such a right; and as that notion, though perhaps erroneous, may be, notwithstanding, very general, I should not be disposed to hold this lease invalid on that ground alone, out of respect to the principle of the maxim *communis error [facit jus]*, which may be thought to apply to that; but I must say, on the other hand, that the words of the power being plain and specific, we are left without any discretion to go out of its terms, whatever inclination we might have to do so, on that or any other such ground. Where the ancient rent is required to be reserved and made payable at the usual times, which must necessarily be on given days, and that, on non-payment at the day, a power of re-entry must be reserved, that power must be followed, and the lease must be made pursuant to that power: now, certainly, a power to re-enter, if the rent be unpaid at *Candlemas*, is not consistent with a power to enter fifteen days after that time when the rent has become due. If, then, the terms of a power are to be taken as the criterion for construing it, as such a deviation would derogate from the remainder-man's right to re-enter so required to be reserved to him, such a qualification may, perhaps, seem to be in substance not within the power. I repeat, however,

1819.

Don, dem.  
Earl JERSEY  
and others  
v.  
SMITH  
and others.

1819.

  
 Dog, dem.  
 Earl Jersey  
 and others  
 v.  
 SMITH  
 and others.

that I do not mean to rely on the inadmissibility of that condition. As to the argument, that a hardship is thrown upon the lessee unless the right to re-enter be qualified with some reasonable condition, I must deprecate all consideration of any such suggestion; because Judges are bound to expound an instrument according to their best judgment, without adverting to hardship on one side or the other. The terms of the power are their only criterion; but whatever hardship there might be, it is convertible, and may affect either party equally; for the reversioner is as much entitled to complain, if he does not succeed to the property according to the intention of the donor, as the lessee has if he mistake the construction of the power under which he derives his title to his lease; and, indeed, much more so, for the lessee has his remedy against the assets of the lessor, whilst the reversioner has no remedy over. There is, however, in point of fact, no hardship on the tenant, whether he is obliged to pay his rent at *Michaelmas* or within fifteen days after. On some certain day it must be paid, and being aware of the time, he ought to be prepared for its payment, at whatever day it may be fixed. Whatever other difficulties I might feel, before I could aver that in my opinion the extension of the time alone would be fatal to this lease, on the second point, I cannot entertain any doubt (except that which I derive from the difference of opinion expressed by learned men) that the restraining this power of re-entry, not only, in case the rent should not be in arrear for fifteen days;

days ; but *also* in case there should be a sufficient distress on the premises, is inconsistent with the terms prescribed by the leasing power ; because that last condition certainly throws on the remainder-man a serious *difficulty* not warranted by the power. If then the first objection be held to be good by so many learned persons, this second must be considered to be so by all ; because that restriction of the power of re-entry is a further and much more important accumulation of the difficulties of the reversioner. Under the power to lease, there can be no doubt, that if the rent should be unpaid on the day on which it was made payable, or at most within fifteen days after, then the right of re-entry was given and intended to be given ; and it would be the fault of the lessee if he should suffer his rent to run in arrear when he might pay it in due time : but if he neglect to do so, is he to be also allowed by a contract between himself and the tenant for life, whose interest in that respect is adverse to that of the reversioner, to throw upon the reversioner or his agents the charge of employing persons to examine the premises for distrainable property, at the hazard of failing in ejectment by reason of that search proving ineffectual ? Many inconveniences were pointed out by the plaintiff's counsel as resulting from such a restriction ; and we cannot but consider those difficulties to be very disadvantageous to his rights : and it seems to me to be a monstrous proposition to maintain, that a tenant for life, without any authority given him by the power which was necessary to enable him

1819.

Doz. dem.  
Earl JERSEY  
and others  
v.  
SMITH  
and others.



1819.

Don, dem.  
 Earl JERSEY  
 and others  
 v.  
 SMITH  
 and others.

him to make such a lease, may operate the reversioner by imposing terms upon the right of re-entry, which may be extremely inconvenient to him, and very injurious to his interests. Then, if we look to the other part of the settlement, we shall find, that, with respect to a great part of the estate, the power of re-entry is prescribed in different terms from those of the leasing power now before us: and I am entitled to assume, that when Miss *Mansel* fixed the right of re-entry in one case at twenty-eight days after the rent became due, she meant that the rent should be paid at the time fixed where she had not given the indulgence of any time. She has herself made the distinction, and whether reasonable or not is not for us to judge; for she is the legislator, and her express directions must be conformed with, if the law will permit them to be carried into execution. Another observation which arises upon the different terms of the powers is, that the leases of the mines (and, under the second power, of the manors, messuages and lands also) must be made to take effect in possession, and *not in reversion*; whereas leases under the power before us may be made to take effect in possession or *in reversion*; and the distinction which I take on that is, that the fact of the sufficiency or insufficiency of distress could not be contemplated with a view to a lease to take effect in reversion; for the provision for re-entry in default of sufficient distress, as applied to leases in reversion when the lessee might not be in possession for twenty years to come, would be absurd. Then  
 it

it was said that the question here is not, whether the words of those qualifications are noticed in the power; but, whether it be not a reasonable construction of the power, that the lessor should agree not to put an end to the interest of the lessee for non-payment of rent, unless in the case of there being no sufficient distress. But the question continually recurs, does not the insertion of that qualification break in upon the clear express intention of the parties to the deed of settlement? In this particular case the lease was in possession, but that does not at all alter the construction of the power. I merely throw this out as to the leases in reversion, as a circumstance, amongst others, which guides us to the intent of the creator of the power, and shews it to be impossible that the settlor could have intended, that the tenant for life was to deal with the lessees whose leases were to take effect in reversion, on the contemplation that there would be a sufficiency of distress as a remedy for securing the rent; or indeed any other remedy than the power of re-entry, during all such time as the leases should continue in reversion. In the way in which it is proposed to construe this power, the parties must be supposed to have intended to enlarge the right of the lessee. It is admitted, on all sides, that a right of re-entry, if the rent was not paid, was intended; but then it has been urged, that if there be a sufficient distress, that right may be suspended during the whole residue of the term. The effect of that would be, that the tenant for life, who has received in advance a large fine, premium,

1819.

Doz, dem.  
Earl Janset  
and others  
v.  
Smith  
and others.

1819.

Don, dem.  
Earl JENNEY  
and others  
v.  
SMITH  
and others.

premium, or foregift (to the amount of 2000*l.*, for instance), is to have all the benefit of the demise against the reversioner, and he is to be excluded for the whole term, because the Judges may be of opinion that this clause inserted on the behalf of the lessee is a reasonable clause. It cannot be denied that it would certainly be a reasonable clause in a *general* point of view; but in *this* particular case it is in direct contravention of the intention of the settlor of the estate in favor of the reversioner; because it would suspend that right of re-entry which, beyond all doubt, was intended to be given at some *certain* time, if the rent should then be unpaid.

For these reasons it seems to me, that, as the settlor could not have intended that any other power of re-entry should be reserved than one which should enable the reversioner to enter on the non-payment of the rent, unconditionally, the lessor has not had due regard to that intention in making the lease in question; and therefore I think that the judgment of the Court below in holding that lease to be a good execution of the power is erroneous.

As to the other question, whether the prior leases were properly received in evidence, I shall content myself with merely referring to the case of *Baynham v. Guy's Hospital*, and the other cases cited by my Brother *Park*, with all of which my Brother *Graham* and myself have been long acquainted, as being quite decisive on that point.

They

They have been always considered good law : and I take it that they have settled that former leases cannot be read in evidence to shew the intention of the parties with respect to others made subsequently.


1879.

Dox, dem.  
Earl JENKIN  
and others  
v.  
SMITH  
and others.

Then on the subject of authority we have the decision of the *King's Bench* in the case of *Coxe v. Day*, which appears to me to be conclusive on the second point; and (I think it material to observe) that case was sent for the opinion of the Court of Law by a most able Judge (Sir *William Grant*) and it is very singular, if *Hotley v. Scot* was to be considered as a decision by which Courts should abide, that so learned a Judge should direct a case to be sent with precisely the same question to the same Court—the *King's Bench*. In the estimation of that learned person, therefore, the case of *Hotley v. Scot* could not have been considered as an authority; and he must have concluded that there was no decision extant upon the question. When we find that in that case (*Coxe v. Day*) the Judges of the Court, stopping the plaintiff's counsel in reply, unanimously concurred in the opinion stated in the certificate, that the lease there was void, as not being conformable to the power, it is a decision (and it is the only one upon the subject) from which we cannot, I think, depart. I therefore cannot but concur in the opinion which has been delivered by my learned Brothers, Mr. Justice *Burrough* and Mr. Justice *Park*.

DALLAS, C. J.

1819.

  
 BOS, dem.  
 Earl JENKINSON  
 and others  
 v.  
 SMITH  
 and others.

DALLAS, C. J. This case has been repeatedly argued at the bar, and most ably certainly upon each occasion, and the subject has been exhausted of observation and authority. It now appears that not only the two Courts differ in opinion, but there is a difference also between the learned Judges this day present. The question, therefore, whatever the result may be, must be considered as one of considerable doubt and difficulty.

The principles which apply to cases of this description are not in dispute, and the leading rule has been already stated in the course of this day. No intent can be implied against that which is plainly expressed; but if there be a doubt upon the words, the construction must be reasonable, and according to the intent of the parties, as it is to be collected from the whole instrument, comparing the different parts with each other—and I say from the instrument; because if from that a clear intent can be collected, a Court is not at liberty to go out of it; or to engraft upon it what may appear to itself to be reasonable; for this would be not to construe but to make a deed for the party: and the question is not what the power ought to have been; but what it is. The power in question relates to leases of different descriptions—to leases determinable on lives, on which the ancient rents are to be reserved; and to leases for years at the best or most improved rent. The former were to contain a proviso for re-entry generally, for non-payment of rent: the latter were to contain a proviso for re-entry

twenty-

twenty-eight days after the rent should be in arrear and unpaid. The present case is of the first description.

3630.  
Dor, dem.  
Earl Arundel  
and others  
vs.  
Sturges  
and others

It is objected that the clause of re-entry varies from that directed by the power in two respects—first, by making the right of re-entry to arise, not upon non-payment of the rent, generally; but fifteen days after such non-payment—and, secondly, by giving it only in case there shall be no sufficient distress to be had or taken on the premises or any part thereof. I shall examine each of these objections separately: and first as to the fifteen days. The power is silent in this respect, directing a right of re-entry on non-payment of rent, and saying nothing more. It has not been contended, that, if the lease had followed the power, and there had been no mention of time, the clause for re-entry would have been uncertain; or, taking it to be sufficiently certain, that the right would not have accrued on the rent becoming in arrear: nor has it been argued that such would not have been a good execution of the power. It is clear, therefore, that the words added produce an effect different from that which would have followed, if the words of the power had been pursued; and that that effect is to convert a present into a future right. In case, therefore, of the death of the tenant for life, the right of the remainder-man to re-enter for non-payment of rent would be postponed by the proviso for fifteen days beyond the time when it would have arisen if the words of the power had been followed.

The

1819.

DOE, dem.  
 Earl JERSEY  
 and others  
 v.  
 SMITH  
 and others.

The doctrine in *Coke Littleton* (a) has been this day referred to in support of the lease; but I understand that section differently; for a distinction is there taken between a right to re-enter generally, on non-payment of rent, and a right to re-enter after a specified time, which, in the latter case, it is said must depend on the time specified in the condition, and is therefore various, being matter of agreement in each case between the parties; thus excluding the notion that there is any such thing as reasonable time abstractedly considered. It is to be considered then on what grounds the proviso in this case can be said to be a due execution of the power: and the first ground I take is this. It is said, that as the power directed a proviso for re-entry on non-payment of rent generally, and without specification as to time, it must be intended that a reasonable right of re-entry was intended, and that the time given is a reasonable time. But to this I cannot agree; because it is an intendment against express words, and words of clear and definite meaning; for the right of re-entry is to accrue on non-payment of rent; and the time, when a right is to attach, is as well specified by the occurrence of an event, as if time itself were expressly mentioned: and here the event is specified, namely, the non-payment of rent. It is, however, said, that the intention of the party is to be considered, and that it is unreasonable to suppose that she could have meant a provision of so much harsh-

(a) Sec. 325.

ness, as that a tenant should be ejected the very moment his rent was in arrear. But the intention of the party is only to be considered as it is to be collected from the instrument itself; and on the instrument, so considered, I can entertain no doubt of what the settlor meant; because she has, to my understanding, made use of plain and clearly intelligible words. But supposing it to be a provision of harshness, which it would be fair to urge if the words of the power were doubtful, and I agree, therefore, that it is fairly urged by those who so consider them; yet if the words be sufficiently clear, we are not at liberty to enter into the consideration of harshness: and still less, to set up what our notions of harshness may be, to justify a departure from the power. What the power orders to be done must be done; for this one reason is of itself sufficient, that it does so order. It is next urged, that looking to other provisions in the same deed, and applying them to the question of intention, the power must be taken to intend what the party executing it has, in effect, done, and when twenty-eight days are expressly ordered to be given in the case of leases for years, in which the rent would be of the real value, can it be supposed (it is asked) that in the case of a rent merely nominal, a right of immediate entry would be intentionally prescribed? Comparing, therefore, the two cases, it is said the proviso was intended to give time in each instance; and that the reason would be stronger for postponing the right of re-entry in the former, and making it immediate in the latter instance.

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But here—again protesting against departing from plain words, and supposing myself at liberty to consider what the intention was—on what ground am I to infer that it was intended to give fifteen days for payment of rent in a case in which the power says nothing of the kind? Is it because in another case, and of a different description, time is given, when it is said there was less reason for giving it? On all legitimate grounds of construction, I feel myself bound to reason differently. If the party distinguish for himself, I am not at liberty to destroy the distinction. Nothing being said as to time in the one case, and time being given in another, proves, at least, that time was under consideration; and even, if in the case of a single proviso, a reasonable time could be implied from the generality of the power, I should say emphatically that in this case, it cannot be implied; because the second provision, if to operate at all, throws light upon the first, and shews, that when time was intended to be given, it is so expressed. Thus the case appears to me on principle. The case of *Jones, d. Cowper v. Verney* has been cited, as shewing, that where the power directs generally a clause for re-entry, a reasonable time may be implied, although the power is silent in that respect. All, however, which that case proves is, that it was done in the particular instance without objection; but what the decision would have been if the objection had been made then as it is made now, we can only conjecture one way or the other, as we think that it ought now to succeed or fail. It leaves the question, therefore, as a question

tion altogether new, this being the only case referred to: and on principle I am at a loss to understand how it can be taken as universally true, that when a power prescribes a proviso for re-entry for non-payment of rent, but is silent as to time, the power, because it is silent, must be taken to speak. And what is reasonable time? Is it to be treated as matter of fact or matter of law? Is it for the Jury in the first instance, or for the Judge? How is it to be ascertained what time is reasonable? On looking through the reported cases, in which it occurs as matter of express condition, we shall find it different in almost every different case. It is so here. As to one set of leases fifteen days are given; in the other twenty-eight. Shall I say it is reasonable in the former, and unreasonable in the latter? Or what measure am I to take? In the cases in the books, it is sometimes fifteen days, sometimes twenty, sometimes forty-two, sometimes sixty; in short, it is mere matter of convention, and therefore peculiar to each. Will any of these cases furnish the rule? If not, what other cases are we to look to, or where is the line to be drawn? These are difficulties which press forcibly on my mind. It is said, however, that the party to execute the power, is to be the judge of what is reasonable; and so he may be, in the first instance, if directed so to do; but if otherwise, I should scarcely think it ought to be so left. But be it so, the difficulty remains the same; for on a question arising between him and the remainder-man, who is to decide but a Jury or a Court? The same difficulty

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difficulty occurs as to amount. Is it to apply to two pounds, five pounds, or any, and if any, to what sum? The same difficulty in drawing a line as to time, applies also to the reservation of rent. These are objections to which I cannot easily find an answer. On the other hand, the line seems plain and direct. When parties have spoken for themselves, let Courts abide by what they have said; but, when words are clear, to seek in a doubtful construction for an uncertain intent, in order to get rid of what may appear harsh, will only lead to litigation, conjecture, vexation, and ruinous expence; in a word, to all which this case has already manifested, and will more fully display before it shall have attained its close. We are told, however, that, if this objection were now to prevail, it would invalidate a great number of leases in this Kingdom granted under similar powers. The fact may possibly be so, and this consideration demands caution; I wish, therefore, to avoid deciding expressly on this ground, whatever may be my view of the subject, as there is another which, taken singly, is decisive to found the opinion which I form. And this brings me to the remaining objection, viz. that part of the proviso for re-entry which relates to there being no sufficient distress on the premises. And here, again, the ground taken is only an extension of the former ground, it is a wider stride of the same exceptionable sort. All the former observations apply, therefore, with increased force, and I shall content myself with referring to them. It will scarcely be said, after the case to which we have

have been referred, of *Rees, d. Powell v. King* — in which there was such a proviso in the lease, and the party was nonsuited for not proving that he had searched every part of the premises, a single cottage remaining unsearched — that such a clause is of indifferent or immaterial operation. On what ground then is it now sought to be justified? First, it is said, that it does no more than the law would do without it, and that therefore, by analogy, it is reasonable. But to this I answer—then leave it to the law. If by law the party will be on the same footing, in effect, without these words as with them, why introduce them? It is said, however, that a clause of re-entry for rent in arrear is considered as in the nature of a mere security for rent; that supposing entry to have been made, still, if not submitted to, an ejectment must be brought; and then that by the statute, on payment of the arrears of rent and all the costs, the proceedings would be stayed, and thus the right to re-enter be destroyed. To this it is added, that by the same statute the landlord must prove that there was no sufficient distress on the premises; so that the law itself subjects him to the necessity of searching for a distress before his right to re-enter can avail. Now this is true, applied to a proceeding under the statute, and if a party shall elect not to re-enter under his right, but shall avail himself of the statute in obtaining the benefit, he must take upon himself the burthen and prove, because the law upon which he proceeds says he must prove, that there was not a sufficient distress. But if he choose to stand upon

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his stipulated right, and take the chance of all the difficulties which may attend demand and re-entry at Common Law, as applied to such right, he is not bound to distrain, and in this respect he may choose for himself. On the other hand, the tenant may get rid of the right to re-enter, by paying up the arrears of rent with costs; but he may not do this, or he may not be able to do it; and in either case the landlord succeeds without having been bound to search for a distress: and where he stipulates not to be so bound, it is competent to him so to do. So it would be under the statute in the case of a valid lease; but here the question is upon the validity of the lease itself, which depends on a due execution of the power, though I admit the argument is only urged to shew, from a supposed analogy, that the proviso in question is not inconsistent with a due execution of the power. But this doctrine was equally resorted to in the case of *Coxe v. Day*. It was there said, that, as the tenant coming in and paying the arrears and costs would be relieved, such a clause was now merely used *in terrorem*; but Lord *Ellenborough*, interrupting the counsel, observed, "Surely the direct power of re-entry is more beneficial to the landlord;" and "the very provision of the Legislature shews there is a difference in this respect." But the case of *Hotley v. Scot* was referred to as an authority in favor of this part of the case: and obscurely as we have it reported, the particular point not being at all adverted to in the decision, still, as the decision must have been different if the objection now made

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made had been deemed valid, I think it in fairness may be taken to be, as far as we can trace what it was, a decision in favor of a power similar to the present. But, giving all the weight that can belong to this case in point of authority, still, as a single case, and a case so imperfectly imported, and so militating as it seems to me (and I speak it with deference) against first principles, I should not feel disposed to subscribe to it if it were not opposed by any other decision, which however I conceive it to be by *Core v. Day*, on which so much has been already observed, that I do not feel it necessary to dwell longer on it. It is in point, unless the present case can be distinguished from it on the grounds on which a distinction has been endeavoured to be raised. I shall therefore examine whether those grounds are sufficient so to distinguish it. And first, it is said, that in the case of *Core v. Day* the Court had only to construe a power prescribing a right of re-entry as applicable to a particular lease; but that in this case it is a question of intention to be determined on a comparison of distinct provisions: and that from such comparison the conclusion results, that the creator of the power must have intended the proviso in question to be such as is found in the lease. I will not repeat what I have already said in this respect. I deny that there is any such ambiguity or generality in the terms of this power as to give discretion, or call for implication or intendment, and even comparing the separate provisions with a view to get at intention, if intention were doubtful on the pre-

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cise words, the reasons become stronger in my view of them against adding the words in question.

The next ground resorted to is that of the former leases, which, it is contended, are admissible evidence; and which leases contain a proviso precisely similar to the present as applied to the property in question. It seems scarcely necessary to say, for it follows as a consequence from all I have hitherto observed, that in my opinion these leases are not admissible. Where no uncertainty results from generality, where nothing is left deficient in point of expression, and where there is no reference to any matter *dehors* the instrument itself, recourse cannot be had to foreign matter; and I think no uncertainty or ambiguity belongs to the instrument in question: nor are there any words of reference to connect it with any other whatever in this respect. But not so in other respects; for as to the rent, when former leases are intended to govern, they are expressly referred to; and it is said "the ancient rent" (that is the rent then reserved by subsisting leases) "shall be the rent under this present power. So as to the power given to let leases of mines, they are directed to have the proper and usual covenants, such as are usually inserted in similar leases; but as to the proviso for re-entry on non-payment of rent, there is no reference to any other lease, nor any words making it necessary to refer to any matter extrinsic of the instrument. But, for the purpose of argument, if we take the leases

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as admitted, how do they remove the difficulty? Because, in former leases not referred to, or even pointed at, there is a provision of a particular description, shewing, that when a right of re-entry was intended to be subjected to the want of a sufficient distress, it is so expressed,—does it follow, that in a subsequent lease the same thing is therefore to be implied when not expressed? Even supposing the former leases to have been made under a similar power, still it would only shift the question from this lease to those; or, taking it that the parties, by acquiescing in such leases, have put by their own acts a construction on their words, it will fall within the rule, that what is matter of legal construction cannot receive explanation from the conduct of the parties. The leases, if let in, would with me leave the difficulty where it was, proceeding on what I deem grounds of legitimate reasoning; but it is enough to say, that for the reasons already given, I hold them to be inadmissible. Even if looking out of the instrument I could conjecture that the maker of the power did so intend, and would have so said if his attention had been drawn to the subject, it would not be a conjecture on which I should feel myself at liberty to act. But to this case, as to many that have gone before, and many that in all probability will follow, the important principle must be applied, that the intent is to be the rule of construction if the words will bear it out; but if the force of the words be such that the intent cannot be complied

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plied with, the rule of law must take place, and the words prevail. A single observation on the case of *Core v. Day*. I admit it must be taken that in the opinion of the Court below that case and the present are dissimilar; but as I cannot distinguish them on the grounds on which the decision proceeded there, or the argument has been rested here, the distinction to my judgment fails altogether; and *Core v. Day* itself being considered by me as properly decided, becomes with me an authority in point.

On the only remaining ground—the general clause for re-entry in the concluding part of the lease—having delivered my opinion so fully on the other points, and deeming this less material and more particularly so, as no reliance has been placed upon it in the course of the several opinions delivered this day; I shall content myself with referring to what has already been said. The result is, that the judgment of the Court of *King's Bench* must be reversed.

Judgment reversed.

## IN THE HOUSE OF LORDS.

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SMITH v. DOE [Lessee of GEORGE Earl of  
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THE majority of the Court of Error in the Exchequer Chamber, having been of opinion, that the judgment of the Court of *King's Bench* ought to be reversed, the defendant brought a writ of error, returnable in parliament, to reverse that judgment of the Exchequer Chamber.

The case was appointed to be heard at the bar of the House of Lords, when

The *Attorney-General* (Sir R. Gifford) and *Puller* argued on the part of the present plaintiff in error: and

*Jervis* and *Maule*, for the defendant.

On the conclusion of the argument the House adjourned to deliberate of their judgment: and in the mean time, finding that they required the assistance and advice of the Judges, they propounded the following question to each of them:

“ Whether—having due regard to the true intent and meaning of the indenture of the 2d day of *July*, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict; and having  
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1819. " also due regard to the legal effect of all the  
 1821. " facts and circumstances found by the special  
 SMITH " verdict—the demise of the 5th of *September*,  
 v. " 1803, as the same is stated in the special ver-  
 DOE, " dict, is for any and what reasons, invalid?"  
 [Lessee of  
 Earl JERSEY.]

*Wednesday,*  
*16th May.*


The twelve Judges having been in consequence summoned to attend the House of Lords for the purpose of answering the question proposed to them, on this day delivered their opinions *seriatim*.

RICHARDSON, J.—having very shortly stated the case, and the question—proceeded as follows:

I am of opinion that the lease of 1803 is invalid; because I think it is not made in conformity with the leasing power contained in the indenture of 1757. The leasing power for that class of leases of which the lease in question is one, requires "that there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved;" and the question resolves itself into this, what is the true construction of these words?


In order to decide this, I must first consider, whether the words themselves import and convey any distinct meaning; and I think they do: I think they mean, that the lessor should have power to re-enter if the rent reserved should not be paid according to the reservation.

One test, and I think a fair one, whether such meaning is conveyed by the words of this power, would be, to insert in a lease a proviso for re-entry, expressed as nearly as possible in the very words of the power itself; and then to consider what construction a proviso so expressed would require; and whether the meaning would be sufficiently distinct to be capable of being enforced by a Court of Justice.

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Suppose then, that in the lease of 1803 it had been provided, that it should be lawful for the lessor or person entitled to the rent "to re-enter for non-payment of the rent hereby reserved." In that case would the person entitled to the rent have been empowered to re-enter if the rent had not been paid on the day of reservation? It seems to me that he would have been so empowered; and *that* without any delay or condition other than the previous demand required by the common law: for all that he would be bound to prove, in order to justify and enforce his re-entry, would be that there was a *non-payment*, on demand, of the rent reserved by the lease. If this be so, it seems to me to prove, that the necessity of waiting fifteen days, and the necessity of proving a deficiency of distress on the premises, imposed by the proviso actually contained in the lease of 1803, are conditions not warranted by the leasing power.

It has been said, that the leasing power requires only "a power of re-entry," much stress having  
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been laid on the indefinite effect of the article "*a*": and it has been further said, that though such power of re-entry is to be "for non-payment of the rent;" yet that the words "*for non-payment*" are not equivalent to "*on non-payment*," but only point at the purpose or object of the power of re-entry, namely, that of securing the payment of the rent.

It appears to my mind, however, that although the article "*a*" be indefinite; yet it cannot in just construction extend an indefinite meaning to the subsequent words, if they sufficiently import (as I think I have shewn they do) a distinct and definite meaning. In this sentence the word "*a*" seems to me neither to add to, nor to qualify the meaning; but that the meaning would have been the same if that word had been wholly omitted, and the sentence had stood thus—"So as there be contained in every such lease power of re-entry for non-payment of the rent thereby to be reserved." And as to the observations made on the meaning of the words "for non-payment of the rent;" although it is true that the word "for" does often import the purpose or object, and so it might here, if the words had been "a power of re-entry *for payment* of the rent:" yet the same word "for" as often imports the cause or occasion of that which is predicated: and such I think is its import here, where the words are "a power of re-entry *for non-payment* of the rent," meaning *on occasion* of the non-payment.

If the words of this leasing power import, as I conceive they do, by themselves, a distinct and definite meaning, I think it follows, that the fact, stated in the special verdict, respecting the usual and accustomed form of leases of the estate mentioned in the marriage settlement, can have no legal effect on the construction to be put on these words. Such evidence, I conceive, is never admissible in the construction of a written instrument, unless the words of the instrument itself import a reference to something extrinsic, or unless the words involve some latent ambiguity, that is, an ambiguity not appearing on perusal of the instrument itself, but which becomes apparent on applying its provisions to the subject-matter. The words of this leasing power in that part which respects the clause of re-entry seem to me to involve no latent ambiguity, nor to import any reference to any thing extrinsic; although some former parts of the same leasing power do import such reference, namely, where it is required that the lands to be leased for lives should be such lands as were in lease for lives at the time of making the settlement, and that the rents to be reserved should be the ancient rents or rents as great and beneficial.

I admit that a Court is bound to look at every part of a written instrument in order to ascertain the meaning of the parties in a particular part. But I think it by no means follows because this settlement, in respect of the rack rent leases, expresses that the tenant is to be allowed twenty-eight

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eight days for payment, that, therefore, it was intended in respect of the leases for lives to give a similar or any allowance of time which is not only not expressed, but which appears to me to be at variance with what is expressed. Supposing however it were possible on this ground to get rid of the objection, made against the lease of 1803, in respect of the allowance of fifteen days; another and still more decisive objection remains, namely, that this lease fetters and confines the power of re-entry to such cases only where there is a want of sufficient distress—a condition which appears to me to be equally inconsistent with the power applicable to leases for rack rents, and to that which is applicable to leases for lives.

The case of *Coxe v. Day* (a), which I think was rightly decided, appears to me to be in point; and I cannot draw any distinction which is satisfactory to my own mind, from the circumstance, that the leasing power there allowed a period of twenty-one days for payment; whereas the leasing power now under consideration, as to the leases for lives expresses no such allowance. It is true that in *Coxe v. Day* the case of *Hotley v. Scot* (b) does not appear to have been cited; and it seems that in the last mentioned case a similar objection, taken to a lease granted under a power, was overruled by the Court of *King's Bench*. On what ground the Court proceeded we are not apprised, and being obliged now to make our election be-

(a) 13 East, 118.

(b) Loft. 316.—See also Mr. Butler's MSS. note, ante, p. 343.

tween the two authorities, I must express my concurrence with that of *Coxe v. Day*.

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It has been suggested that the statute of 4th Geo. II. c. 28., though professedly made for the benefit of landlords, does in effect take away their right of re-entry at common law, and confine them in all cases to the statutable remedy thereby given, which remedy can never be exercised without proof that no sufficient distress was to be found on the demised premises counter-ailing the arrears then due. And I think it must be admitted that this construction of the statute, if it be the true construction, furnishes a sufficient answer to the second objection made to the lease of 1803: for in that case the lease has only expressed that, which, whether expressed in the lease or not, the statute law has provided.

But I cannot think that this is the true construction of the statute.

The object of the statute, as appears to me, both from the recital and the enactments, was to relieve landlords from certain inconveniences to which they were subject by the law as it then stood, and to give them certain remedies to which they were not before entitled; but not to deprive them of any remedies or rights to which they were already entitled by law. It contains no negative or prohibitory words, which I think would obviously have been inserted, if the intention had been to deny to the landlord the future exercise

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of any ancient right. And it would, as it strikes me, be a strange construction to hold, that the words apparently intended for the landlord's benefit do, from their generality, operate to extinguish any of his ancient rights, when, if such had been the intention, it would have been so easy and so obvious to express it. That such however was not the intention I think manifestly appears from this, that wherever the new mode of proceeding in ejectment given by the statute is pursued, the statute declares that "then and in every such case the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made." It refers to the legal demand and re-entry as a still subsisting mode of proceeding, not repealed or affected by the statute, and thereby shews that the old mode of proceeding was intended to be left as it was; although the new one, if adopted, is declared to be equivalent for the purpose of obtaining a valid judgment and execution. This, I believe, has always been considered as the intent and effect of the statute. And although I am not able to point out any case where it has been expressly decided that the statute does not take away the landlord's remedy at common law, several cases have occurred where landlords have so proceeded without objection on that ground, and it has been taken for granted that they were entitled to do so. *Doe, d. Forster v. Wandlass* (a), and *Roe, d.*

(a) 7 T. R. 117.

*West v. Davis*(a), are cases to this effect; and so is 1 *W. Sand.* 286, n. 16 (a).

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It has been said, that if the lease of 1803 be invalidated, the decision will shake many titles. I have no means of knowing whether this observation is well founded, or to what extent. If such should be the consequence I shall regret it; but I cannot feel that such an apprehension can afford a legitimate ground for deciding the present case otherwise than as the words and legal effect of the instruments now under consideration seem to me to require.

Upon the whole therefore I am bound, for the reasons before given, to answer the question proposed by your Lordships, in the affirmative.

BEST, J.—having adverted to the words of the power, observing, that they were wholly general and indefinite,—delivered his opinion nearly as follows:—

I consider the law to be now settled, beyond all contradiction, by a variety of cases, none of which are touched by the determination in *Coxe v. Day*, or any other conflicting authority, that, under a general power, such as this is, given in a deed enabling a tenant for life to let the property upon leases, requiring that he shall reserve a

(a) 7 East, 363.

(b) And see *Doe, d. Vaughan v. Meyler*, 2 M. & S. 276.

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power of re-entry for non-payment of rent, an absolute unconditional power to re-enter, the instant the rent is due is not thereby necessarily required. I admit that any conditions with which the tenant for life may qualify the power to be reserved must be reasonable and legal; but I consider that the intention of the settlor is satisfied, in this case, by the power of re-entry which has been reserved in the proviso, containing, as it does, these usual and reasonable qualifications. They are qualifications from which no injurious consequences can result to the reversioner, either by lessening his security for the payment of the rent, or in any other respect; whilst they protect the tenant from the danger of being entrapped into an immediate forfeiture, if indeed a forfeiture could be exacted from him so long as the rent due to the reversioner should be sufficiently secured. It has been settled that these qualifications cannot be excluded from such a condition as this is, the object of which is entirely the security of the rent, but by express words; and here there are none to be found. Nor is this a new doctrine in law, or confined in its application to subjects of this nature: it applies to every part of the law as far as it affects human conditions. If one contract generally to deliver goods, it is not imperatively necessary that they should be delivered on the instant: all that can be required is, that they be delivered within a reasonable time. If any stipulated service be engaged to be performed, the performance of it must be intended to be undertaken within a reasonable period:

riod: and that reasonable period again does not, in construction, exact the condition that the contracting party shall occupy every moment of the intermediate time in the service to be performed, to the exclusion of all relaxation, and to the neglect of his own affairs. All cases of this nature must be decided with reference to that common principle. If cases were necessary to support that principle, I say this very point has been decided, and these very conditions have been sanctioned as reasonable and usual, valid and subsisting under such a power as this. The practice of *Westminster Hall*, and the understanding of all lawyers in all time have uniformly recognized this principle as well as those which I shall have occasion to state hereafter. The cases are certainly very few. I consider that that of *Core v. Day* has nothing to do with this question; so far from it that if I had had the honor of a seat on the Bench when that was so determined as it is reported to have been, I should have coincided in that decision. Of the cases I have alluded to, the first which I shall mention, is that of *Jones*, on the demise of *Cowper* and another, v. *Verney* and others (a). I am aware that this is only a negative authority, founded on the question not having been raised there, although the opportunity was afforded. It proves, however, when the industry and learning of the bar at that period be considered (and we find from a note to the report, that the case was argued by *Prime* and *Wright* King's Serjeants, for the plain-

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(a) Willes Rep. 169.

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tiff, and by *Skinner* King's Serjeant, and *Burnett* Serjeant for the defendant, on two different days), that the objection not having been taken, it was in their opinion, and in that of the Bench, not tenable. In that case a tenant for life was empowered to grant building leases; so as in every such lease there be contained a condition of re-entry for non-payment of rent, and the usual and reasonable covenants. It is stated that there was a clause of re-entry in the lease for non-payment of the rent in forty-two days after the days of payment; (so that the qualification there was much more extensive in point of time than in the present case) yet notwithstanding that obvious occurrence of this objection there, it was not insisted on, or alluded to. Then I consider that the next case which I shall mention (that of *Hotley v. Scot*) has expressly decided this point. I take it from Mr. *Butler's* note of that case, which (however young he might have been at that time) I consider to be perfectly accurate, as it bears every appearance of that care and correctness for which he has since been distinguished. The note is short, but it furnishes the distinct ground of Lord *Mansfield's* judgment, and on that I think this case also ought to be decided. The power was to lease for years, and in the leases a clause for re-entry was to be inserted if the rent were unpaid for twenty-one days: the lease in question had such a clause; but it added "and no sufficient distress could be had." Lord *Mansfield* says, what I consider to be an able epitome of the law upon the subject, "The clause of re-entry is short with words of course, (his

(his Lordship, referring to the settled form used in practice) and does not preclude the operation of law. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute it cannot be without want of distress." Judgment was accordingly given for the defendants. Lord *Mansfield* therefore held, that the clause was a good execution of the power, although the power authorized no such stipulation in words. So should we hold in this case. I use the decision of *Hottley v. Scot* for a double purpose; not only for the sake of the authority of the Judge; but for the sanction by the Court of the doctrine afforded by the form being recognized as agreeable to the general practice of conveyancers which was there considered as in itself an authority for the Court, and of which the counsel who argued the case of *Jones, dem. Cowper v. Verney* must, in those days, have been fully aware; and therefore it was that the point was not on that occasion raised in argument. The object of the clause of re-entry has uniformly been considered to be, *security for payment of the rent merely*: and upon that ground it is that Equity always relieves against the forfeiture. In the case of *Wadman v. Calcraft (a)*, the late Master of the Rolls states that to be the principle on which the Court relieves against forfeiture for non-payment of rent; and therefore it is that Equity will not suffer a lessor to take any other advantage of the clause.

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[His Lordship stated the language of the judgment, to that effect.]

That being the only recognized available object of the clause of re-entry, and as it is impossible to shew that the introduction of the conditions inserted in this proviso at all tends to abridge or diminish the security for the rent, I hold that it is therefore not an insufficient execution of the power given by the deed, that such qualifications should be introduced.

But I rely mainly on the position, that if the creator of a power would exclude the effects of the otherwise necessary operation of law upon powers of a similar nature; and if he requires a deviation from the established forms of practice in the particular instance, it can only be effected by express words: and if there be no such words of exclusion used, all the known, the usual, the legal qualifications may be introduced in executing the power. To alter the regular course of law, there must be the consent of parties. In *Dormer's case* (a), it was resolved (long before the statute of the 4th of *Geo. II.* when the law required a demand of the rent before a forfeiture should attach) that "re-entry for default of payment of rent without demand of it may be by *SPECIAL consent* of parties. At that time the party meaning to re-enter must have demanded the rent at the last period of the day on which

(a) 5 Co. 40 b.

it was due, or he could not avail himself of the right of re-entry. However general, therefore, the power might be, still the law qualified it by a necessity of making a demand of the rent; and if it should be intended that the common course of law was not to take effect, the special consent of the parties was necessary to be expressed in terms to that effect, or the operation of law upon the general contract would not have been excluded. If that were so before the statute, why, when the statute has taken away that necessity, and created another, should not that other be regarded as a legal qualification, and as necessarily implied by law, as the former had been? The words of the report in *Coke* are, "And divers other cases were put, where consent of the parties shall *alter* the *form* and *course* of the law." The use I make of that case is to shew, that where a legal qualification is *not expressly excluded* by the parties in terms, the law attaches and has the effect of controlling and moulding their general contracts. In this power, as created by the deed, there is nothing expressed to exclude the operation of law and the established practice of *Westminster-Hall*; and the Courts have always held these qualifications, adopted in the common forms of assurances in use with conveyancers, to be reasonable and proper. Then the case of *Hotley v. Scot* is a positive authority in favor of the introduction of such conditions, and is not in any degree negatived by the case of *Core v. Day*. The Court did not give such a judgment in that case as has been assumed in

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in argument. Two of the Judges (Lord *Ellenborough* and Mr. J. *Bayley*) who delivered their opinions in the case of *Core v. Day*, have since supported the determination in *Hotley v. Scot*, by the judgment which they have pronounced on this case in the same Court, and which I consider is not affected by the decision in *Core v. Day*. Lord *Ellenborough*, indeed, while the case was arguing, certainly threw out incidental observations, apparently militating with the doctrine of the case in *Hotley v. Scot* — but it is not fair to hold a Judge bound by the occasional remarks which proceed from him in the course of the discussion, and which are often mentioned merely for the sake of fixing the attention of counsel, or giving a new direction to the course of the argument. It is only from the ultimate decision of the case that any principle of law can be fairly and properly deduced. The case of *Core v. Day* is, however, very distinguishable from the present and from *Hotley v. Scot*, and in this very material respect. There is a qualification introduced into the power of re-entry in the lease which was the subject-matter of argument in the former case, by the creator of it, by which the landlord would have been deprived of the benefit of the statute of the 4th of *Geo. II.* and the tenant would have had all the undue advantage of the difficulty, attending the old necessity of making a demand of the rent with all formalities which that statute was meant to extinguish. The words of the condition of the power in that case are, “So as in every such leases there be contained a condition

condition of re-entry for non-payment of the rent reserved by the space of twenty-one days." So far the proviso for re-entry pursues the words of the power, and if it had stopped there, it would, perhaps, have been held sufficient, as it might then have been said, that it was a *specific* power, it prescribed *all* the terms which the creator of it meant should qualify the right of re-entry, according to the rule, that *Expressio unius est exclusio alterius*. But the distinction on which I rely, is the introduction of the words, "*being lawfully demanded*" between those words and the other member of the condition, that no sufficient distress can be found upon the premises. In that case, unquestionably, the proviso in the lease was not, in that particular respect, in conformity with the power in the deed; because, by inserting the words "*being lawfully demanded*," such a condition was not only not warranted by the law, but it was contrary to law, casting on the landlord a burthen and difficulty, from which an express statute had been passed for the purpose of relieving him. He would be, by such a condition, thrown back into the difficulties from which the statute had extricated him: he must, in that case, have watched for the particular day on which the rent should become due, and have made the demand, as formerly, at sun-set, with all the formalities which had been dispensed with by the new law. The rejection of such a condition, indeed, is fully consistent with the principle that the landlord's right shall not be clogged with difficulties beyond the law. That case, therefore, I consider

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as very distinguishable from the decision in *Hotley v. Scot* in that respect; and that, for that reason, it is not a conflicting determination; and I think the latter, confirmed as I have shewn it to have been, abundant authority for the decision of this question in the negative.

Another principle to be considered in forming an opinion in this case, furnished by the case of *Opey v. Thomasius (a)*, is, that powers are to be expounded according to the intent of the parties, as was said by Mr. Justice *Twisden*—a rule recognized more fully in *Goodtitle v. Funucan (b)*, (stating Lord *Mansfield's* judgment). If then the sole legitimate object of the power to re-enter, which is now only a common modification of the enjoyment of real property, be to secure the payment of rent, and if the intention of the party exacting the introduction of such a power, is to be regarded in construing the terms of it—can any man doubt that the intention of the creator of this leasing power has been fully satisfied by the clause for re-entry inserted in the proviso for that purpose in this lease? It has merely for object, I repeat, to secure the rent, and that is the only legitimate purpose of it. If an absolute forfeiture of leases was to be the immediate inevitable consequence of non-payment of the rent reserved on the day it became due, it would be a consequence most prejudicial to the tenant, to the landlord, to the remainder-man, and to the public; for it

(a) Sir T. Raym. 132.

(b) Dougl. 565.

would

would tend to discourage the cultivators of land, and create a neglect of property injurious to all parties, and to the community at large, if forfeitures were to be rigidly exacted without regard to circumstances. But would the conditions attached to this power of re-entry defeat, in any respect, those or any fair views of either party to whom it related, and for whose interest it was intended? It certainly would not, and therefore I say, that if the intention of the parties is to be attended to, I consider that this lease was a sufficient execution of the power.

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But whether I am right or not in the view which I have taken of this question, I have done enough to establish the validity of this lease, if I have brought the case into doubt and difficulty: and that it has been brought into doubt is apparent from the various and protracted discussion which it has occasioned both in the Courts below and in this House. I should be one of the last to advise your Lordships, as a Judge, that established rules of law should in any case be materially broken in upon, out of regard to any considerations resting upon equitable grounds; because I am aware that great iniquity is always the consequence of every such deviation from those rules. But when the equity of a case consists with the law arising upon the circumstances of it, as far as any settled principles of law can be found to apply, rigid strictness should not be insisted upon. Equity is naturally engraven on the hearts of all men learned and unlearned. Every one
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may see the palpable equity and the justice of this case. In doubtful matters, consequences may be weighed; and I have frequently heard the most eminent Judges say of particular cases pending before them, in which they have felt themselves fettered by the ancient usage and course of practice, that if they were new they would decide them according to the reason and equity of the circumstances, where not inconsistent with the rules of law: and I consider it to be sound legal reasoning that established principles are not to be shaken. But in this case the established practice and the weight of authorities are decisively in favor of the obvious reason and justice of it; and if this case were not now to be decided agreeably with that established course, the determination would shake the titles of every person in the kingdom who is in possession of valuable estates held upon leases under such powers as this. An immense proportion of the landed property of this country is granted out by tenants for life upon leases of this sort for valuable consideration, and this lamentable consequence would follow, that claims for indemnity to an enormous amount would be set up against funds which may have been long ago raised by the provident care of prudent fathers, to secure provisions for younger branches; and the grantees of valuable leases fairly purchased might, on a sudden, be turned out of possession of their estates for a mere error in the framing of the instrument; although the form should be consistent with the long established precedents which have been followed in all practice.

practice. These leases are granted to a very great extent, all over the West of *England*, where this practice of settling estates particularly prevails. The estate of many a family, therefore, in that part of the country, depends on the validity of such demises : and I have reason to know, from means afforded by my situation as Judge upon that Circuit, that similar attempts have been already made to take advantage of similar objections. Therefore, I should be disposed to hold, that it would be sufficient to support such leases against such objections, that there should be any *doubt* upon the question ; and that there are doubts of very considerable magnitude, the experience of this case abundantly shews.

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My opinion being, that the lease in question is valid, makes it unnecessary for me to say any thing upon the point which has been raised as to the admissibility in evidence of the former leases.

This power being general, and the proviso for re-entry contained in the lease having in it nothing unreasonable or inconsistent with the terms of the condition upon which it was to be exercised ; I therefore feel myself bound to answer the question which has been proposed to us by your Lordships, in the negative.

GARROW, *Baron*, stated that he concurred in opinion with Mr. Justice *Best*, supported as he was by the very high authority of the late Lord *Ellenborough* :

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Ellenborough: and that his answer to the question must therefore be, that the lease in question was not invalid.

[His Lordship then proceeded to give his reasons so nearly, in substance, to the same effect as he had expressed himself in the *Exchequer Chamber*, as to make it unnecessary to repeat them here.]

BURROUGH, J.—Since the judgment was given in this case, in the Court of *Exchequer Chamber*, I have paid the closest attention to the subject. I have over and over again weighed in my mind the various facts and circumstances contained in the special verdict—and I have earnestly endeavoured to discover whether I had formed an erroneous opinion, when I concurred in that judgment.

After the fullest deliberation, I am of opinion that the demise of the 5th *September*, 1803, is *invalid*—that it was valid only during the life of the lessor: and that his death determined the estate of the lessee.

The statute of the 4 *Geo. II. c. 28.* was relied on in the *Exchequer Chamber*, and in argument before your Lordships, as bearing on the subject. In *my* view of this case, it has no application to the subject before the House. That statute (as I conceive) applies only to leases which, before the statute, might and must have been avoided by entry—to cases where the cause of avoidance might

might have been waived. Such leases were valid till a strict legal entry was made, and before such entry, they were capable of confirmation by suitable acts done by him in whom the right of re-entry was; but a lease by a *tenant for life*, having a special power to *demise*, if *not made conformable* to the power, is the lease of a mere tenant for life; and has validity only during his life, and not a moment longer.

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I cannot see that any well-grounded argument, from a provision made by an act of Parliament, in the case of demises of a description wholly different from the demises in question, can be urged in support of that demise. In forming our judgments on the question submitted to us by your Lordships, we must consider that we are required to give our opinions on the construction of a DEED.

There are certain rules of the common law which must govern us on such an occasion.

One rule is — that the construction must be made on the whole deed. The principle of the common law is, *Ex antecedentibus & consequentibus est optima interpretatio**.

There is another rule which also strongly applies to the case in question — and that is, *Quoties in verbis est nulla ambiguitas, ibi nulla expositio contra verba fienda est*.

* *Shep. Touchst.* C. 5. R. 4. p. 87.

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Acting on these rules, I contend that there is no ambiguity in the words of the power, and that it is manifest from the various parts of the deed of the 2d *July*, 1757, that it was the intention of the parties to have those words understood as *they are written*, and *without addition*.

The clause of re-entry in the demise ought, I contend, to have corresponded with the *reddendum*, which is to this effect, “Yielding and paying the yearly rent of 2*l.* at *Michaelmas* and *Lady-day*, by equal portions,”—and not so corresponding, I am of opinion the lease is invalid.

1st. Because there can be no re-entry, unless this rent is behind and unpaid, for fifteen days from *Michaelmas* and *Lady-day*, which is an *extension* of the *time beyond* that in the *reddendum*.

2dly. Because the re-entry for non-payment of the rent cannot, by the express terms of the demise, be made, if there is sufficient distress to be had on the premises.

The general scope of the deed is too well known to require repetition.

It has heretofore been considered, that there are three distinct powers in this deed. I conceive that, correctly speaking, there is only one power, consisting of three distinct part.

I say

I say this — because the enabling words — “that it shall and may be lawful &c.” are placed at the head of the whole, and are not afterwards repeated — and the other parts are introduced by the words “and also.” It appears to me, from this mode of looking at the deed, that it may be fairly collected, that the framers of it must have had their minds directed to the different *parts* of the power — and must have designedly and deliberately introduced an additional restriction in that part of the power which relates to leases for years, and references in other parts to *extrinsic* matters — and designedly and deliberately omitted any such additional restriction in the part of the power in question, and also all words of reference to extrinsic matters or former leases.

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The first part of the power is that which relates immediately to the demise in question. By this — Mr. *Vernon* and his wife (who by the deed took successive estates for life), are enabled to grant leases for life, or years determinable on the death of a life or lives, of *such lands as at the time* of the deed were leased *for life, or years* determinable on the dropping of a life or lives. So as the *ancient and accustomed yearly rents, dues, and services*, or more or as great and beneficial rents, &c. be reserved or made payable, and *so as there be contained in every such lease a power of re-entry* for non-payment of the *rent thereby to be reserved*. Now, what is the rent thereby to be reserved, but the rent in the *reddendum*? The power of re-entry is to be for

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the *non-payment* of that rent. If that rent was not paid at *Michaelmas-day* or *Lady-day*, I contend it is plain, by the very terms of the deed, that the right of re-entry ought to be complete.

It is not to be doubted, that former leases were admissible in evidence — for two purposes.

1st. To shew what lands were at the time of the demise leased for life or years, as described in the deed.

2dly. To shew what the ancient and accustomed rents were. For former leases are for those purposes necessarily referred to. But it appears to me to be free from doubt, that as to the power of re-entry prescribed by the deed, there is no reference to former leases, or to prior circumstances, but to the *reddendum* only—ascertaining not only the rent itself, but also the mode and time of payment. This power of re-entry prescribed by the deed is framed in plain terms — it contains a clear proposition in itself—and therefore I contend, that the maxim that *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*, is precisely applicable to this point. Thus to decide, is to avoid the vicious mode of interpretation which is reprobated by a maxim to be found in Lord Bacon's Tracts*, *Divinatio non interpretatio est quæ omnino recedit a literâ*. If you stir beyond what the deed expressly pre-

* Fol. 47.

scribes — then commences the *divinatio* — and the *interpretatio* is at an end.

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Next follows in the deed what I say is more properly a second part of the same power, than a distinct and separate power — the general enabling words being at the beginning of the whole. This part is connected with the former part by the words “and also.”

“And also by indenture to demise any of the lands in the settlement, for any term not exceeding twenty-one years in possession. So as there be reserved as much, or as great and beneficial yearly and other rents as were then yielded, or the best and most improved yearly rent or rents as can be *reasonably* had or obtained; and *so as in every such lease for an absolute term of years* (thus distinguishing this from the former lease) there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid for the *space of twenty-eight days* after the time thereby respectively appointed for payment thereof.” This part of the power, which is, as it were, uttered in the same breath with the former part — *under* the same enabling words, and *united* to them by the words “and also,” affords very important observations. 1st. The rents to be reserved in these leases are to be *as much*, or as great and beneficial, as were then yielded. Here then is a plain reference to the then existing state of rents. To prove this, the former leases were good evidence; or, 2dly. The

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rents are to be the best and most improved that can be *reasonably* gotten.

This admits too of reference to extrinsic matters.

The third observation is as to the clause of re-entry prescribed by this part of the power, in case the rent be behind or unpaid for twenty-eight days.

With great deference to the judgment of those who entertain a different opinion, I cannot refrain from expressing *my strong opinion* on this part of the deed. In my mind it affords an argument of irresistible weight—that the parties to this deed, intentionally omitted an extension of the time of payment in the first part of the power under which the demise in question is contended to be valid; and that they intentionally inserted the extension of twenty-eight days in the second part. And I confess I feel myself alarmed for the fate of mens' deeds—if it shall be holden by your Lordships that the demise in question *is valid*, which contains an extension of the time of payment to fifteen additional days—not *hinted at* in the power itself, and inconsistent with the *reddendum*: and which also contains a provision which deprives the reversioner of his re-entry, if on any part of the premises there may chance to be sufficient distress. That the clause of distress imposes a difficulty on the reversioner, is proved by the case of *Rees*, on the demise

demise of *Powell*, against *King* and *Morris*, tried before Mr. Justice *Heath*, in the Summer of 1800, at *Hereford*, whose opinion was ratified by the opinion of the Judges of the Court of *Exchequer* in the following Term. It was there held, that a clause of forfeiture in a lease, in case no sufficient distress was to be found in the premises, must be pursued strictly, and every part of the premises must be searched.

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The third part of the power is introduced in the same manner as the second part. This is the part which empowers the leasing of mines then open, or lands wherein persons may be willing to open mines. Annexed to this there are several restrictions running in this language. So as in every such lease there be reserved or made payable such parts of the lead, copper, ore, coal and other produce, to be gotten from the said mines, or such other yearly rent or income in respect thereof, as can be *reasonably* had or gotten for the same, without taking any fine, &c. And so as the lessees execute counterparts. And so as there be inserted such proper and usual covenants for the effectually working the mines &c. and doing all proper and necessary acts as are usually inserted in leases of the like nature. It is to be observed, that with respect to these leases there are special restrictions peculiarly applicable to them. The parties to the deed had all the parts of this power before them, and have cautiously introduced restrictions applicable to each part—and can a Court of Law *add* to these restrictions?

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The rent of the mines, or the parts of the produce to be reserved, are to be such as can be *reasonably* gotten — the covenants are to be the usual covenants for effectually working them, and doing all necessary acts. In the second and third parts — the word *reasonably* is introduced; but it is wholly omitted in the first part. Is a court of Law authorized to transplant the word *reasonable* to the first part, when the parties have introduced it in the second and third parts, and omitted it in the first part? I humbly submit to your Lordships that this cannot be done, if it varies the construction of the words, as the parties have penned them. We are required to state to your Lordships our respective opinions. Whether, having regard to the true intent and meaning of the indenture of *July, 1757*, according to the legal construction of the several parts of it, and having due regard to the legal effect of the facts and circumstances found by the verdict — the demise is for any and what reason invalid?

I feel, that if I depart from the plain meaning of plain words — made (if it were possible) more plain by the context matter, that I shall be at sea without a compass. If the demise in question had contained a power of re-entry, framed in words literally corresponding with the power in the settlement, I conceive it would have been good. I have heard no valid objection to such a power of re-entry. Notwithstanding the most earnest attention to the subject, before and since
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the arguments in the Exchequer Chamber and before your Lordships, I have not been able to raise in my mind a doubt of the fitness of such a clause, or of its being that which the parties intended.

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For the reasons I have stated,

1st. I am of opinion that the former leases were not admissible in evidence to shew that they contain clauses similar to those to be found in the demise in question, respecting the extension of time of payment, and respecting the distress.

2d. I am of opinion, for the reasons I have given, that the demise in question is invalid.

The House has been told at the Bar that a decision that this demise is invalid, will have the effect of destroying other leases made under similar powers. I cannot take notice of such a statement.

1st. Because it is an assertion of a fact of which, as a Judge in a Court of Law, I can have no knowledge.

2d. If it were fit that it should weigh with us—ought we not to see the settlements and the leases, in order to know that the *antecedentia et consequentia*, are the same as in the case before your Lordships?

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A variation in the words and context matter, might vary the grounds of our judgment.

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3dly. If there were other leases made under circumstances precisely similar, I would not vary the opinion I have formed. I cannot accommodate my opinion to the convenience of lessees under powers. Their estates must stand or fall by the authority under which they are made.

It is a maxim of our law, that it is better to suffer a mischief than an inconvenience. The mischief (if it be any) we can see the extent of. It will be, that certain demises, in consequence of the carelessness or ignorance of those who drew them, will be invalid, and they who were intended to take, in the event of their being no good subsisting leases, will take.

On the other hand, no one can foresee the end of inconveniences which would arise from the relaxation of the rules of the law in the construction of these deeds.

I have only a few words to add as to the cases of *Hotley v. Scot*, and *Coxe v. Day*.

From the report of the first case I cannot discover what was decided. It is to me unintelligible. But, supposing it to be applicable, we have, in the later case of *Coxe v. Day*, the decision of four learned men on the second question, which has great weight with me, and I cannot

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see why it ought not to guide our judgment on the present occasion.

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It is well known that the late Lord Chief Justice of the *Common Pleas*, Sir *Vicary Gibbs*, thought that decision right, and was of opinion that the present lease was invalid. He was in office when the present case found its way into the *Exchequer Chamber*.

HOLROYD, J.—I think, that having due regard to the indenture of the 2d day of *July*, 1757, according to the *legal* construction of the several parts of that indenture, as stated in the special verdict, and having also due regard to the *legal* effect of all the facts and circumstances found by the special verdict, the demise of the 5th of *September*, 1803, as the same is stated in the special verdict, is invalid. By the death of Lord *Vernon* the lessor, who had an estate in him for life only, that demise became invalid, unless it were made in conformity to one of the powers of leasing contained in the above-mentioned indenture of the 2d *July*, 1757.

[His Lordship then stated, very shortly, the nature of the three leasing powers.]

Each of those powers is clogged with qualifications of two descriptions, one class of which is comparative, or with reference either to the existing or the previous state of things, or to usage or custom, or to what can reasonably be had or obtained;

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obtained: the other class is direct and absolute, without any reference or regard either to the existing or previous state of things, or to usage or custom, or to what can be reasonably had or obtained, or to any matter whatever. These last qualifications are superadded by the creatrix of the power, to be complied with at all events, as I think without reference or regard to any matter, and not to be varied, changed, or altered by, or at all to depend upon any usage, custom, or state of things, or any matter whatever.

The first of the above powers of leasing is that upon which the present question depends, the power of leasing for a life or lives, or for years determinable upon a life or lives. The qualifications with which that power is clogged are, as to the reservation of the rents, duties, and services, that they be such as were the ancient and accustomed, or more or as great or beneficial as at the time of demising were payable, or as much as a just proportion thereof amounts to, according to the value of the premises demised, or more, with the exception of heriots. These qualifications are comparative, or with reference expressly to the things there expressed, and must be such as on such comparison or reference shall be found conformable thereto, and are wholly dependent thereupon.

But the other class of qualifications superadded to this power, is direct and absolute, and without reference to and wholly independent, as it seems

seems to me, upon any other matter, except what the law requires, and to be complied with at all events, whatever may be or may have been any usage, custom, or state of things whatever. These other qualifications are, that the rents, duties, and services, be incident to and go along with the reversion and remainder; that the leases contain a power of re-entry for non-payment of the rent reserved; and do not contain any express clause, freeing the lessees from impeachment of waste; and that the lessees seal and deliver a counterpart of the lease.

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It is upon one of these direct, absolute, and independent qualifications of that power, that the present question has arisen. That qualification is in the following words — “So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved.” This qualification being expressed in words that are direct and absolute, and without reference to any former leases, or to any prior or then existing state of things, or former management or disposition of the property, the fact found by the Jury, with respect to the former leases, cannot, I think, vary the legal construction to be given to this qualification. There is in the words no latent ambiguity which those former leases either raise or remove. If the words be not clear and explicit in themselves, their ambiguity, if any, is upon the face of the deed itself; and they cannot, I think, by law be allowed to crave in aid any former usage to vary or alter this construction, and this more especially in the
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case of such a deed as the present, wherein the parties expressly direct that a reference to the then existing, or to former usage should be had recourse to, where they intend that either of them should be called in aid on the subject-matter of these qualifications. Besides, it has been held, by the Court of *King's Bench*, in *Iggulden v. May* (a), as well as by the Lord Chancellor in the same case (b), ratifying similar doctrine that had before been held both by Lord *Alvanley* and Sir *Wm. Grant*, when Masters of the Rolls, on covenants for the renewal of leases, that the construction of deeds cannot be varied by the acts of the parties; and therefore various other leases that had been before successively made by the owners of the inheritance, for the time being, could not be taken in aid to construe the meaning of a covenant for renewal. The instability and uncertainty introduced into rights of property created by deed, by letting in such extrinsic evidence, and the mischiefs arising therefrom, would apply equally, as it seems to me, to the present case.

The present question arises in a case where the exercise of the power is by a person (namely Lord *Vernon*) who, previous to the creation of the power, was a stranger to the estate; and in a case where this qualification of the power given to him by his wife must be taken to have been inserted, as well for the benefit of herself as of

(a) 7 East, 237.

(b) 9 Ves. 329.

the several other persons in remainder, in derogation of whose rights the exercise of the power would operate, so long as the lease should continue valid after the extinction of his own life estate. It would operate in derogation of her and their rights, by depriving them successively of the actual occupation and enjoyment of the demised premises themselves, which they would otherwise be entitled to have, and giving them successively in lieu thereof a rent or rents, such as the power required, however inadequate the same might be.

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The power given to the tenant for life to lease for a term that may last beyond his own life, is, agreeably to what is said by Lord *Ellenborough* in *Coxe v. Day*, for the benefit of the tenant for life; the qualifications only, as he there also says, are for the benefit of those in remainder. And in this case those in remainder, who are to be protected by these qualifications, except the creatrix of the power herself, are not parties or privies, but are strangers to the deed; and therefore as to them the words of the deed are to have their full operation for their protection against the tenant for life who executed the power, and against whose act, which would or might be to their detriment, they were to be protected by this qualification. The very intent of prescribing these requisites is to protect the several remainder-men from the *discretion* of the tenant for life, in the exercise of this power of leasing given to him. The object of the qualification is to secure
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to them the rent itself, and not to give them any substitute whatever in lieu thereof other than and except the land itself for which the rent was to be paid. For this purpose this qualification looks to and specifies some occasion or event, and that a simple unqualified one, namely, the non-payment of rent, not under any particular circumstances only, but generally whenever there is a non-payment of rent; that is to say, it looks to and specifies the default of the lessees by the non-payment of the rent, as the occasion or event on which those entitled to the rent to be paid for the land shall, for want of the rent, have the land itself—the *quid pro quo* the rent was to be paid. Whenever that event or default arises, the case then exists, I think, on which the land was to be had for that default, without any other matter being to be superadded thereupon, except what the general *rules of law, independently of particular terms* of contract, would require, such as those requiring in a particular manner and form a demand of the rent due.

The words applying to the power of re-entry required to be contained in the lease, are “a power of re-entry *for* non-payment of the rent thereby to be reserved,” that is, as I think, such power as will authorize the party, whenever there is a non-payment of the reserved rent, to re-enter. That is the expressed cause, on account of which he is to be at liberty to re-enter, which liberty must, I think, be co-extensive and co-existent with that cause: and that cause which is non-payment

ment of rent, such I mean as will authorize a re-entry, exists from the very instant that there is such a default of payment as the law requires to authorize a re-entry. And that default of payment equally exists from the moment of such a demand being made of the rent due, and non-payment thereon, without any subsequent definite period of time having elapsed; and whether there be or be not distrainable goods on the premises sufficient to pay the arrears of the rent, and by the sale of which the remainder-man may *at his own trouble and risk* pay himself those arrears. The words "for non-payment" must in this, I think, be taken to mean the same as either "because of," "by reason of," "on account of," or "in case of" non-payment, that is to say, when that event occurs; and the same therefore as if the words were "*on non-payment of rent.*" That appears to me to be the proper sense and meaning of the words; and it is also as I think agreeable to the object of the qualification, which is, that the party shall have the land whenever the lessee fails to pay the rent for it. The lessee's failure or default in the performance of a duty which it is incumbent upon him to perform, is the sole ground and consideration for entitling the party to re-enter, and have again the land without regard to any possibility or power the rent owner may have to obtain the rent, by any other means or exertions of his own.

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But it has been argued, that this qualification, in requiring a power of re-entry, is silent as to

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the time when it should be carried into effect; and therefore that it may be considered to require only, that there should be some reasonable power of re-entry for non-payment of the rent; and that the power of re-entry, reserved upon the lease in question, is a reasonable power of re-entry for non-payment of the rent; and therefore as much as the creatrix of the power has required. To this, besides observing that the word "reasonable" is not here used in the deed, though it is used in two other instances in giving those powers where a discretion was intended to be given, I answer, that this qualification, in my opinion, is not to be so considered, if upon the due and proper construction of this leasing power, this leasing power, if fully executed, would have authorised a re-entry for non-payment of rent in any case in which such re-entry would not be authorised for non-payment of rent upon the lease in question. And I say that there are cases in which if the power of leasing had been fully executed, a re-entry might lawfully be made for the non-payment of rent, in which it could not lawfully be made for such non-payment under this lease. To try whether this be so or not, suppose the right of re-entry reserved by this lease, instead of its being in its present form, had used the very words of qualification used in the deed creating the power of leasing. Suppose the lease had been, "provided that it shall be lawful for the lessees, &c. to re-enter (or 'that they shall have power of re-entry') for non-payment of the rent hereby reserved." That is an easy and obvious

vious way of framing the proviso, and most likely to be adopted, as I should think, by a person having recourse to and looking at the leasing power, as he ought to do, who is anxious to be secure; and that, clearly, I think, would have been a due execution of the power: and under such an execution of the power, by using those words in the lease, whenever there was a default of payment, whether fifteen days had elapsed or not since the rent became due, or whether a sufficient distress was on the demised premises or not, the right of re-entry would have arisen, in case the landlord had made such a demand of the rent as the law for that purpose requires, so that the same construction would be given to those words, where used in the lease, as if the words had been "on non-payment of rent;" whereas, according to the right of re-entry actually reserved, the landlord has no such right of re-entry (though the rent is due, and has been so demanded) for fifteen days, during which he would have such a right under such a due execution of the power of leasing, as I have supposed: nor could he have such right of re-entry at any period of time, when there was a sufficient distress on the premises on which he might levy for his rent, though upon the goods of innocent third persons, which right of re-entry he would have during all that period in the other case, and without the painful necessity of being driven, in any case, to his remedy by distress upon the goods of innocent strangers. So that he has not that right and specific remedy in lieu of his rent in those cases under

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1819. the lease in question, which he would have had
 under it, on such a due execution of the leasing
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 v. some conscientious persons would not resort to,
 DOE, or enforce—such as enforcing the power of dis-
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The construction of the words in question, therefore, if used in a lease instead of being used in a leasing power, taken according to the proper and ordinary sense and meaning of the words used, would, as it appears to me, have given a right of re-entry immediately on non-payment of the rent. They cannot, therefore, I think, be properly deemed to have a different import and signification, when used in the leasing power, from what they would have when used in a lease made in conformity to that power; or than they would have, if they were used in any lease whatever.

There is not only no right of re-entry given for non-payment of the rent until a default of payment for fifteen days; but even on such default the right given by the proviso is not a right of re-entry to possess or enjoy the land, but a right only of distress in case there be a sufficient distress upon the premises. In the forms of leases contained in *Horseman's Conveyancing*, in the edition that I have, I have been able to find only one that is clogged with the insufficiency of distress: all the others appear to be without it.

Those

Those leases appear to have been between the times of the statutes of *W. & M.* and *Geo. II.* and several of the conveyances there, for securing annuities, give first a power of distress in case the annuity be in arrear for a given number of days; and a right of entry and enjoyment till satisfaction, in case it be in arrear for a larger number of days, without regard to whether there be or be not any sufficient distress upon the premises.

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I think too, that it affords an argument in favor of the above construction—and that nothing else can legally be deemed to have been in the contemplation or intention of the creatrix of the leasing power, when she used the words in question, than a mere simple non-payment or default of payment of rent generally, unaccompanied with any other fact or circumstance, except that which the general rule of law requires, namely, a demand—that it is manifest, that when she meant that any other fact or circumstance should accompany that non-payment before the right of re-entry should be given, she has expressly mentioned it; for in the second leasing power, she enables leases to be granted, though the right of re-entry be not reserved, except upon a lapse of non-payment for twenty-eight days after the time appointed for payment of the rent: and I do not see how the lease in question can be held to be valid except upon principles of law, that would have rendered it also valid, in case the creatrix of the leasing powers had also expressly added in the

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second leasing power another ingredient besides that lapse of twenty-eight days, namely, the want of a sufficient distress upon the premises, without both of which, in addition to the non-payment of rent, a right of re-entry need not in that case have been reserved under the second leasing power.

But, in truth, the reserved right of re-entry which is now in question (whether it is to be deemed reasonable or unreasonable), is not a right of re-entry for non-payment of rent, but it is, in truth, a right of re-entry for a different thing, which may never exist; notwithstanding there is a default of payment of rent, namely, for an aggregate, consisting in part, indeed, of that default, but of two other things besides, viz. a certain lapse of time, and a want of sufficient distress. It is, in reality, not a right of re-entry for non-payment of rent, but a right of re-entry for want of a sufficient distress in case of such non-payment. Instead of giving a right of re-entry for non-payment of rent, it refers the remainder-man to the right of distress on that event—a right which he would have by the general law, even without such reference; and it gives him the right of re-entry only at a later time for a different thing, and on a further event—the want of a sufficient distress. It is not, therefore, in reality, a right of re-entry for the same thing as the creatrix of the leasing power required it should be for (and which right, as I have said before, must, I think, be co-extensive with the existence, with the thing or event or default for which it

was

was given) but it is a right of re-entry for a combination of things, all which must exist before the right of re-entry in question can be exercised: and, how reasonable soever it may be thought, that this qualification of this leasing power might have been given by its creatrix for the securing of the rent, instead of the qualification she has actually given to it; it cannot, I think, be substituted for the qualification which she has actually given and required. But it has been argued, that all this is immaterial; because of the general clause of re-entry that follows, for default of performance of any of the reservations, covenants &c. But it is so completely settled, both on the maxims and authorities of law, that the general clause of re-entry can extend only to cases not before specially provided for; more especially when it would otherwise contradict and defeat the prior express provision, that I shall say no more on this point.

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Then it has further been objected, that this leasing power being given and executed since the statute of the 4th *Geo.* II. (ch. 28. s. 2.) the insertion of a want of sufficient distress on the demised premises in the lease, in order to give the right of re-entry, has become immaterial; because (it has been urged) since that statute, no right of re-entry for non-payment of rent can be rendered effectual so as to regain the actual possession, unless where there is no sufficient distress to be found on the demised premises, counter-vailing the arrears of rent due. But that statute

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does not appear to me to make any difference in the present case. That statute applies only to cases where the landlord has omitted to make such a demand of the rent as would entitle him to the forfeiture, and it substitutes, for his relief, other things to be done in lieu, and then gives him the benefit of a forfeiture, to which he would not otherwise be entitled: and it gives him that benefit only in certain cases, amongst which is the want of a sufficient distress, and on certain terms. But notwithstanding that statute, when a due demand of the rent has been made, a right of re-entry may since be given, and may be effectually enforced, though a sufficient distress be upon the demised premises. That statute too, applies only to cases where half-a-year's rent is in arrear, and not to cases where a less arrear of rent is due, as may be on a lease in question by a part-payment; although the rent is reserved, not quarterly, but half-yearly.

But it has been further urged, that not only the above statute of the 4 *Geo.* II., but all the cases, both at Law and in Equity, shew that the object of a power of re-entry is only to secure the payment of the rent. It was then contended, that the payment of the rent is as effectually and as beneficially secured by the power of re-entry actually reserved in the present case, as if that power had been in the words used in the leasing power; inasmuch as it is said that it reserves the right of re-entry in all cases where the landlord cannot himself, by a distress, obtain the payment of

of the rent. This it was argued, appears, by the necessity there is (even after entry) of obtaining judgment and execution in an action of ejectment, before possession can be obtained, and by the relief which Courts, both of Law and Equity, but more particularly the latter, give, independently of the provisions of that statute, in cases of forfeiture for non-payment of rent.

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But let us see how the case, as to this point stands. If the right of re-entry reserved had been merely for non-payment of the rent in the terms of the right of re-entry required by the leasing power, it is clear, I take it, that on a due demand of the rent being made (and by the statute 4 Geo. II. even without such demand, where half-a-year's rent remains due) the landlord would have been entitled, either to have the rent itself actually paid to him, or to have the land. No other act in that case need be done, or trouble or risk undergone by him with regard to the rent; but without further act trouble or risk on his part, he might immediately enter into the land, or immediately proceed to recover the possession thereof by an action of ejectment, against which the tenant could not get relief without his paying the rent itself, with costs: and unless he thus gets such relief, the landlord would be entitled to recover all the mesne profits *from the time of the default* by the non-payment of the rent. The right of re-entry actually reserved in the present case, gives him no power to re-enter or to proceed by ejectment until the expiration of fifteen days,

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days, nor at any period of time until there is the want of a sufficient distress upon the premises; nor any right to recover the mesne profits further back than, not only the expiration of the fifteen days, but also the time when there can be proved to be, or when there was such want of distress: and so long as there continues such a distress, the only remedy the landlord has for the rent is by action for it, or by distress; so that instead of having the rent by the payment and act of the lessee himself, or in default thereof an immediate right to re-enter or recover possession of the land itself, the remainder-man is driven to the necessity of incurring, not only the trouble and expence of ascertaining whether there is or is not a sufficient legal distress upon the premises, whether of the property of the tenant or of third persons; and of waiting, where the distress is of standing corn, until it is ripe and cut (for till then it cannot, by the statute, be appraised or sold for payment of the rent); but also incurring the trouble delay and risk attending the making the distress, in such manner as is in no respect illegal, either by reason of the manner of making or disposing thereof, or by reason of the distrained property being privileged from distress by the same being in the way to market, or by reason of trade or otherwise. But the tenant may deprive him of the power of sale by a replevy of the distress, and it may happen, at the end of the replevin suit, that, by the eloignement of the distrained property, the insufficiency of the pledges in replevin,

plevin, and the insolvency, or death without sufficient assets unadministered of the sheriff and the tenant, his remedy by distress may finally fail, with the additional loss and costs both of the distress and of the replevin suit: and if this does not happen, he may still be without his rent, unless he take upon himself the trouble and expence of prosecuting execution *pro retorno habendo*, or for his debt and costs, and the trouble and risk of prosecuting some further action or actions against the sheriff or the bail in replevin, in case such execution shall prove ineffectual: and his remedy by ejectment would be delayed in that case, until these results of the replevin suit shall have been ascertained, even if an action of ejectment would then lie for the non-payment of that rent which had been before distrained for—so that after the termination of the distress and replevin suit, it may happen that the remainderman may lose his rent, with the addition of costs.

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The payment of the rent is not therefore, I think, as effectually and beneficially secured by the right of re-entry actually reserved, as if that right had been reserved in the words of or according to the leasing power.

I have considered the question as above, independently of the disputed authorities of *Coxe v. Day* and *Doe, d. Vaughan, v. Meyler*, both which cases, I think, were rightly decided, notwithstanding the prior case of *Hotley v. Scot*.

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I have considered the question too as if in the lease the rent reserved had been a money rent only; because it has been so treated in the arguments here, and in the Courts below: but it is to be observed, that this is the case not of a lease for a money rent only, but also for a rent of another nature, although certainly a very small one, namely, the additional rent of a couple of fat capons or money, at the election, not of the tenant, but of the lessor or remainder-man who would therefore be entitled, if he pleased, to have that rent in kind, instead of money. It has been considered on all sides, as the case of a lease for money rent only, I presume, on this ground, that the special right of re-entry depending on the want of a sufficient distress, does not apply to this additional rent or reservation, but to the money rent only; and that the right of re-entry applicable to this additional rent, is the general right of re-entry subsequently given by the lease, in case of default in payment or performance of any of the reservations, covenants &c.: and this may be the case if the statute of 2 *W. & M.* (which is the statute giving the power of sale of a distress for rent) be deemed to be confined to money rents only; but if the default of payment of this additional rent be within the special right of re-entry depending on the want of a sufficient distress, more especially if this kind of rent be also not within the above statute of *W. & M.*, so that this distress could not be sold under that statute for the purpose of raising or paying that rent—though, if it could

could be sold for that purpose it would not raise the rent in kind agreeable to the landlord's right of election, but in money only, at least not without additional trouble or expence to the landlord of purchasing the rent in kind with the money raised by the sale, that is, either by doing it himself, or procuring another to do it—I say that in such case the question proposed to us by your Lordships, as it appears to me, would embrace still further considerations arising from those circumstances, as the distress for that small rent in kind, viz. the two capons, would in that case (that is to say, if it could not be sold under the statute) remain only a dry, unprofitable, chargeable pledge for that rent, in lieu of the productive security of the enjoyment of the land. This, however, it is unnecessary for me to consider; inasmuch as, whether the additional rent, in kind, would embrace further considerations as to the law of the case or not, I think, for the reasons which I have before stated, that, having due regard to every thing alluded to in the question proposed to us by your Lordships, the lease in question is invalid.

PARK, J. delivered his opinion, as far as his Lordship advanced any additional arguments in support of his former reasoning, as follows:

I shall answer the question, proposed to the Judges, very shortly; because I have so fully given my opinion upon it in another place, a full and accurate report of which, in two different books,

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books, is in the hands of some of your Lordships. And meaning, in what I am to trouble the House with, to adhere to the opinion I formerly delivered, I, of course, in answer to your Lordships' question, must state, that, having a due regard, &c. (using the precise terms of the question proposed to the Judges, as in page 379); the demise of the 5th September, 1803, is, in my opinion, invalid.

I proceed to state to your Lordships, as the question requires, my reasons for so thinking.

But, before I do so, I beg your Lordships to believe me, when I positively disclaim the notion, that I *thus* give my opinion, in order to preserve my own consistency. I have often heard eminent Judges so declare; but surely consistency in error is no credit to the man or the Judge. For one, I should never be ashamed, and have lately so acted upon that feeling, where my understanding is convinced that I had upon some former occasion formed an erroneous judgment, manfully, fearlessly to acknowledge it; and as speedily as possible to retrace my steps.

[His Lordship then stated the two objections to this lease, which have been already so frequently repeated.]

These two objections, continued his Lordship, fall under very different considerations; but it
must

must be admitted, that if either of them prevail, the lease is invalid.

As to the general rules which govern the Courts in the construction of leasing powers, they are all now well understood; and have been so fully explained and commented upon by some of my learned Brothers, who have preceded me, that it would be a silly parade of learning, and a useless waste of the time of the House to enter upon them, it being sufficient to state that the intention of the parties, as it is to be collected from the instrument, is to be the governing principle in the construction. (Here his Lordship took up the argument as formerly delivered by him in the *Exchequer Chamber*, and which will be found, *ante*, p. 312, 313.) When this case was before the *Exchequer Chamber*, I stated, that if the only objection to this lease were the time given, before the lapse of which he could not re-enter for non-payment of the rent, as then advised, I should think the objection fatal. I have heard nothing since to remove my doubt. It is said, indeed, that the indefinite article *a* being used, namely, *a power*—any power that is REASONABLE may be inserted. But what right have we to do this for the grantor of the power? Who has a right to insert this word? Who, if inserted, is to construe it? The Court or the Jury? If fifteen days be reasonable, why not twenty, twenty-five, and thirty? That this was never contemplated I think quite clear; for whenever time is meant to be given, it is expressed; and therefore she must

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be presumed to have known, that where she meant to give time, it ought to be expressed; lest the giving it in one case should be construed, as I do, that it was not intended to be given in the other. But I have said, and I repeat, what right have we to insert the word *reasonable* into this power? If this word "reasonable" never found its way into powers, it might perhaps more fairly be argued that it was inherent in all. But looking at precedents and adjudged cases, we do find the words *usual* and *reasonable* sometimes jointly introduced, sometimes separately: and those words, when introduced, compel the Courts to consider what are *usual*—what are *reasonable* covenants under such powers. If then it is not unusual to insert such words, why are the Court to introduce them where the creator of the power has not, and who, by omitting them, must be taken to have intended that they should not be inserted?

But I am staggered by what is said in a book of great authority, and to which I think the professional public are much indebted, (*Sugden*\*) that if this objection were to prevail, it would invalidate nine tenths of all the leases in the kingdom granted under powers. I can only say such a consequence is to be deeply deplored; but it is entirely owing to this, that those who have prepared such leases have chosen to follow their own new-fangled conceits, instead of using the exact words of the power, conferring the right

\* On Powers, p. 626, 3d edition (or in 2d edition, 623.)

to lease upon certain terms, and upon certain terms only. This argument that many leases will be invalidated may be a very good one to your Lordships in your legislative capacity, on account of the hardship of the case; but cannot and ought not to influence you when your province is *jus dicere, non dare*.

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However, if this were the only objection to the lease in question, on account of the long practice which has prevailed, as it is alleged, I might be inclined to pause before I presumed to offer my humble advice to your Lordships, that on this ground alone the lease would be void.

But the second objection seems to me to be impossible to be got over. I have thought much about it, both before I gave my judgment in the *Exchequer Chamber* and since. I have turned it in every point of view. I have heard all that the learning and ability of the Bar could suggest. I have, of course, been present at all the conferences with my learned Brethren. I have been most desirous to be convinced, if my opinion be erroneous: but, after all, I cannot raise in my own mind a probable doubt: and though, if the decision of your Lordships should be ultimately in favour of the lease, it will be my duty to conform to that opinion, I am *at present* bound to state my entire concurrence upon this point with my learned Brothers *Richardson, Burrough,* and *Holroyd*, who have preceded me. Their luminous exposition of the argument, and my



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own judgment in the *Exchequer Chamber*, which is accurately reported both by Messrs. *Broderip* and *Bingham* and by Mr. *Moore*, and which is in the possession of some of your Lordships, render it unnecessary for me to do more, on this head, than to make an observation or two on the cases that have been quoted.

The main reliance on the other side is on the case of *Hotley v. Scot (a)*. Of the reporter of that case I shall say no more than this (without forming any judgment of my own) that, during a long professional life of forty years, *Lofft's Reports* embracing a period of that great man's life who then presided in the Court of *King's Bench* during which, as to this part of them, there is no other reporter, (for the Reports of the very learned person, now at your Lordships' table [*Cowper*] did not commence till 1774, nearly two years after [this part of] Mr. *Lofft's*) I never heard them quoted three times in my life. But, without any observations of this kind, it is quite clear from that report, that none of the learned counsel then at the Bar (Mr. *Dunning* or Mr. *Bearcroft*) nor my Lord *Mansfield*, nor any of the Judges appear to have taken the least notice of the condition as to the want of a sufficient distress, which is the very point now under consideration; and which, from the terms of the power and lease in that case might have arisen. But, it is said, that Mr. *Butler* has a note\* of that case, taken by him-

(a) *Lofft*. 316.\* *Ante*, p. 343.

self, in which it appears to have been mentioned. I have not seen that note, and therefore I can say nothing about it. I entertain great respect for that gentleman, and I do not wish to depreciate the labours of the young; but, unless he be much more advanced in life than, for the sake of the public, I wish him to be, he must, forty-eight years ago, have been a very young man. But, admitting the point to have been mentioned, it cannot have formed a prominent feature either in the argument at the Bar, or in the consideration of the Court; for if it had, it is impossible that Mr. *Lofft* or any other man, in a report of four pages, should have omitted it. Can such a case, for a moment, be put in competition with that of *Core v. Day*, where this clause was the main objection to the lease—a case most ably argued at the Bar by the now Chief Justice of that Court, and receiving the deliberate certificate of four very eminent Judges, Lord *Ellenborough* and Justices *Grose*, *Le Blanc*, and *Bayley*? In the course of that argument Lord *Ellenborough* said, “There can be no doubt that it is more beneficial to the owner of the estate to have a power of re-entry at once upon the tenant, upon non-payment of rent within a certain time, than to have such a power only in case there shall be no sufficient distress upon the premises.” And in another part, when Mr. *Abbott* was strongly pressing on the Court that such a clause secured the landlord’s object, namely, by satisfying his rent more speedily than in any other way, Lord *Ellenborough* said, in answer, “In the one case it is to

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1819. *be secured from time to time by successive suits,*  
 1821. *with the risk of sureties, if the distress be re-*  
 SMITH *plevied: in the other it is secured, once for all,*  
 v. *by the landlord's re-possessing himself of the land*  
 DOX, *out of which the rent is derived."*  
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Can any one say, my Lords, that the one remedy is not more easy, more direct, and less circuitous, than the other? And that great man, Lord *Ellenborough*, again says, "*Surely the direct power is more beneficial to the landlord.*" The certificate of all the learned Judges is in direct conformity with these *dicta* of Lord *Ellenborough*; for it is, "We are of opinion that the power of re-entry reserved in and by the said lease for non-payment of the rent, is not made in conformity to the power in the settlement for granting leases of the freehold part of the said demised premises, and that the lease is void on that ground." Not having seen any report of the judgment of the *King's Bench* upon this case of *Doe, d. Jersey, v. Smith*, I cannot tell whether this case of *Coxe v. Day* was re-called to their attention; but I am quite sure it is impossible to reconcile the one with the other. This was so strongly felt by two very learned Judges in the Court below, that at once they doubt the propriety of that decision: and one of them says, it is not law; for it is diametrically opposite to reason and common sense. I am sorry to say, I think directly the contrary; but I for one seriously object to this mode of getting rid of decisions because they militate against our own notions.

tions. I agree with the pointed manner in which this was expressed lately in *this* House by the Lord Chief Justice of the *Common Pleas*: and I hope I shall be excused for using his language. "If the law so settled is now to be considered as unsettled, I know not on what foundation, in point of law, any decision can stand."

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But the case of *Core v. Day* is not a solitary case; for it again, in about three years after, came under the consideration of three of the same Judges who decided *Core v. Day*, namely, Lord *Ellenborough*, and Justices *Le Blanc* and *Bayley*, with the addition of another learned person, now no more; (Mr. Justice *Dampier*) and they could not have decided as they did, without determining that such a clause as we are now considering, rendered a lease void where the power did not authorise it. The case I allude to is *Doe, d. Vaughan, v. Meyler (a)*. That case was tried before the latter Judge, at *Hereford*, who thought the objection, such as we have here, was one that went to the whole lease; though it was partly of lands of which the lessor was seised in fee, and of lands in which he had only an estate for life, with a leasing power; provided there was a clause of re-entry for non-payment of rent for fifteen days. The lease was not executed according to that power; for it added, "and if there be no sufficient distress." But the Court held that though the lease was void, because not executed accord-

(a) 2-Maule &amp; Selw. 276.

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*ing to the power*; yet it was good as to the land of which the lessor was seised in fee: and they apportioned the rent: which was an erroneous judgment, if this objection to the present lease be not a good one. The case of *Rees*, on the demise of *Powell, v. King (a)*, I formerly thought, and still think, sets this point at rest, by shewing that such a clause as this throws a burden upon the right of re-entry, which the maker of the power never contemplated. That case having been so often mentioned, it is enough to say of it, that it has decided, that, before a plaintiff in ejectment can recover upon a clause of re-entry in a lease, in case there be no sufficient distress on the premises, he must shew that every part of the premises has been searched, else he cannot say there was no sufficient distress. The Judge who first decided this was well known to some of your Lordships; and no man will decry the knowledge of the late Mr. Justice *Heath*. His opinion was confirmed by the Court of *Exchequer*. If the Courts of *Westminster Hall* were to overturn that decision, it would go a great way to shake my present opinion; but I do not learn that any of my Brethren are prepared to do so: and if, therefore, I feel myself bound, as I shall do, to call upon any plaintiff in ejectment on the circuit who has such a clog on his clause of re-entry as this, to prove that he has made a full search for a distress, before I permit such a plaintiff to recover, I cannot conscientiously advise your Lordships that this lease is valid;

(a) *Forrest. 19.*

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most sincerely wishing however, that, consistently with my honest opinion, I could do so. Of one other point I must take notice, namely, that, as this lease contains a general clause of re-entry, it must necessarily control the special clause. To that position I for one cannot at present agree; for I find the contrary doctrine maintained from *Altham's case* (a), down to the present day.

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[Upon this part of the case his Lordship employed the same reasoning, and adverted to the same authorities as he will be found to have done in his argument in the *Exchequer Chamber*, ante, p. 316.]

The point upon the statute of the 4th of *Geo.* the II. has been so ably handled, and so luminously explained by my learned Brother *Holroyd*, who has just addressed the House, that I shall not trouble your Lordships on that point, but to say, I entirely concur with him.

The next point is, whether the other leases should be admitted as evidence, and upon that I shall trouble the House very shortly. I am willing to admit, that if this deed upon the clause in question contains any latent ambiguity raised by extrinsic evidence, parol evidence or extrinsic evidence may be admitted to explain it, or to render it unambiguous. But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to con-

(a) 8 Co. 134.

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tradict, vary, or add to the terms of a deed. It would be of most dangerous consequence to admit such testimony; for then parties dealing on matters in writing, made upon advice and consideration, would be subjected either to the uncertain testimony of vague and precarious memory, or, as in the case at Bar, to matter of which, at the time of contracting, they might have no knowledge, and of which they never intended to be under the controul. The written instrument, therefore — unless in cases of fraud, or other excepted cases, with which I need not trouble your Lordships (and of which I insist this is not one) — must be considered as speaking the sense of the parties to that deed or instrument. Upon this ground I conceive it was that the case of *Cooke v. Booth* (a) met with such a decided opinion against it in *Baynham v. Guy's Hospital* (b) by Lord *Alvanley*, when Master of the Rolls, who not only states his own opinion, but that of the late Mr. Justice *Wilson*, who had argued the case of *Cooke v. Booth*, and who, Lord *Alvanley* says, was astonished at the decision: and it was also disapproved of by Lord *Thurlow*. The Master of the Rolls says, “I strongly protest against the argument of the learned Judges, in *Cooke v. Booth*, as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it.” The case of *Tritton v. Foote* (c) seems also directly at variance with *Cooke v. Booth*. In *Iggulden v. May* (d), the Court

(a) Cowp. 819.

(b) 3 Ves. 298.

(c) 2 Bro. C. C. 636.

(d) 2 N. R. 449. The original case and the pleadings are in 7 East, 237. and see also 9 Ves. 325.

of *Exchequer Chamber* unanimously affirming a judgment of the Court of *King's Bench*, held that a covenant in a lease to grant a new lease with all such covenants, grants, and articles as in the said indenture is contained, does not bind the lessor to insert a covenant of renewal in *the renewed lease*; although it was alleged in the pleadings, that the covenant required *had been introduced* in various other cases before then successively made and executed on renewals from time to time granted. The Lord Chief Justice *Mansfield*, stopping the then Mr. *Abbott*, who was to have argued against the construction contended for on the other side, said, that the case of *Cooke v. Booth* was the first time that the acts of the parties to a deed were ever made use of in a Court of Law to assist the construction of that deed: and in another part of his judgment his Lordship says, that is "a case which has been impeached upon all occasions, and in which the Court of *King's Bench* were misled by the renewals stated in the case sent by the Court of *Chancery*." Now what is asked for in the present case but to assist the construction of an unambiguous deed by the prior acts of the parties? And in a case which I argued as Counsel, in *2 East, 376\**, though the lease there was according to the custom of the country as to the time of holding; yet, being dated *29th March*, it was held not to be a lease *in possession*; and that because the days of holding were, as to the tillage, from the *13th of February past*; the pasture-ground from the *5th of April next*; and the residue of the premises from the *12th of May next*.

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\* *Doe, d. Allan, v. Calvert.*

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But, my Lords, in my opinion, cases are not wanted to prove that no evidence can be admitted to explain a deed which is plain and perspicuous in its terms, containing no ambiguity; much less *to add* clogs and conditions to it. I am asked then, is this a deed of that description? I answer, that in my opinion it is. I see no ambiguity: it is precise and definite in the powers granted. Every person of plain and common understanding, much more every person with a legal mind, can give it a clear and satisfactory solution. But I am told the case of *Fonnereau v. Poyntz (a)*, before Lord Chancellor *Thurlow*, is against my opinion. Upon the best attention I can pay to that case, I do not think so. That case was a bequest of the sum of 500*l.* stock, in long annuities, and similar bequests of smaller sums in the same stock to others. The question was, whether this was a bequest of 500*l.* a-year long annuities, or only 500*l.* in the long annuities. The case was very powerfully argued by one of your Lordships. I own I should have thought there was no difficulty in the construction: and Lord *Thurlow* seemed at first to be of that opinion; but he afterwards admitted evidence to shew the extent of the property of the testatrix, to see whether she could possibly mean 500*l.* a-year, when she had no such stock. But though his Lordship admitted this, he states the clear principle of law to be, that, for the wisest reasons, it will not admit of an instrument being construed

(a) 1 Bro. Ch. Ca. 472.

*aliunde*. And in the close of that case his Lordship says what I quote to your Lordships as strong in my favor; because he only lets in the evidence to explain *what is uncertain*—"There is no doubt if the word *stock* had been left out, but that the meaning would be *that the sum of 500l. was to be disposed of in long annuities, and to make a produce, and that produce to accumulate* until the legatee should attain twenty-one. This being the doubtful interpretation upon the face of the will, the question arises, whether the *state* of the testatrix's fortune is not applicable to the construction of the will. It appears by some other parts of the will, that she was extremely anxious to make an ample provision for the family of the *Fonnereaus*. Considering then, the situation of her fortune, it is perfectly inconsistent to say that she could mean to give *ten times more than she was worth*, in legacies. My opinion therefore is, that the judgment must be reversed, and that I can let in the *evidence* of the value of the estate, not to *control the bequests* which the testatrix has made in words themselves distinct, nor to control a bequest which she has made of a subject which she had accurately described; but because the words she has used are *uncertain*. The *peculiarity* of this will furnishes sufficient doubt to *warrant* the admission of collateral evidence to explain it, and if so, the statement of the testatrix's fortune is applicable to the purpose of such an explanation." His Lordship, whether right or wrong in his notion, clearly admits evidence *aliunde* on the ground of uncertainty and ambiguity only, and leaves the

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the principle wholly untouched — that parol evidence, or evidence *aliunde*, cannot be admitted to contradict, add to, or vary the terms of a deed, will, or other written instrument. Now here, the terms of this power are clear and express, without limitation, clog or condition — nothing being doubtful or ambiguous — and the evidence sought to be admitted is not to explain that which is doubtful; but to add two clauses or two conditions to that which is absolute and unconditional: in short, to make a new deed in this respect.

The decision I am humbly recommending, steers clear of all vagueness and uncertainty, leaving nothing to the variety of conflicting opinions. For who is to decide what is reasonable? If the Judges — I should be inclined to think it would be mischievous in its consequences; but worse if the Jury are to be called on to decide it. What can lead to such contrariety of decision? for we all know, in every transaction of human life, what is reasonable or unreasonable must depend upon the reasoning and feeling of every individual who has to consider the question.

I heard it said that this will unsettle many leases. I should lament it if it should have such an effect; but in that case the legislature might interpose. If, however, the mode of construing powers, which I am now proposing as the true one, had been always adhered to, no such evil could have ensued. The hardship of the individual case is represented: and if there be hardship, I also, as
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an individual, lament it. This statement of hardship, and the consequences of what I should propose, have made me again and again examine this point with all the ability in my power; but, after all this consideration, feeling that it is my sworn and therefore bounden duty to declare what I believe the law to be now—not to say what it ought to be—I think, that, to decide in favor of the lease, would be to make a power different substantially from that which was made; and to make conditions which the creator of it never intended. This would be my opinion if I stood alone, but I am happy not to be singular in my judgment on this important question, although I am opposed to others whose ability I respect, and whose learning I revere.

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BAYLEY, J.—Upon the best consideration I am able to give this case, I can find no reason for departing from the original opinion which I formerly entertained when this case first came before the Court of *King's Bench*—that the lease in question is conformable to the leasing power in the deed of settlement; and is therefore valid. On the case of *Coxe v. Day*, I find it necessary to state, that, when this question was under the consideration of the Court, that decision was perfectly in their recollection; and they considered that their judgment in the present case, did not in any respect break in upon, or clash with that determination.

The clause in the settlement under which this
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lease was authorized requires it to contain "a power of re-entry—for non-payment of the rent:" and the first question for your Lordships' consideration is, whether this lease does or does not contain a power of re-entry for non-payment of the rent? It contains, in fact, a proviso that, if the rent be behind or unpaid by the space of fifteen days; and no sufficient distress can be had upon the premises, the persons entitled to the rent and the freehold and inheritance may re-enter. Is this, or is it not, *a power* given to the landlord? Undoubtedly it is. Does it not enable him to re-enter? It does: and for what cause? For *non-payment of the rent* reserved. I admit that it is not an immediate or unconditional power of re-entry; but still it is—"a power of re-entry"—and "*for non-payment of the rent reserved.*"

It is material to this question to see what the law was with regard to these powers from the earliest times. Referring to *Coke Littleton* (sect. 325.) we find instances of various conditions for re-entry, "if the rent be behind by a week after the day of payment," or "by a month," or "half a year." We find also from the Year Books (20 *Hen.* VI. 30, 31.—6 *Hen.* VII. 3.—*Bro. Abr.* tit. *Entre Congeable*, pl. 90.) that the time for making demand of the rent to warrant a re-entry is at the end of the last day of such week, month, or half year, and not on the rent day. It is not, therefore, inconsistent in law with a requisition, that there should be reserved
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a power of re-entry, that it be not immediate; or that it be postponed for some length of time after the day fixed for the payment of the rent. In *Godbolt*, p. 110, ca. 130*, we have an instance of a condition for re-entry, "if the rent be behind, and no sufficient distress upon the land." I therefore consider that a power of re-entry on condition that the rent be behind and no sufficient distress upon the land, is an acknowledged legal power of re-entry for non-payment of rent. The power, as reserved in this case, may, however, not be the most beneficial power to the reversioner which could be devised: and being qualified with these conditions it may in certain possible cases not afford the conveniences of an absolute right of re-entry; but still it is a power of re-entry, and, if it be sufficient to secure the payment of the rent, I hold that this lease does contain in terms all that is required by the words of the leasing power in the settlement.

But then it is urged, by those who would impugn this lease as not being a good execution of the power to demise, that, admitting it to contain a power of re-entry, it is not *such a* power as the indenture of the 2d of *July*, 1757, due regard being had to its intent and meaning in legal construction, requires to be inserted in the leases to be made under this particular power. That argument however necessarily as-

* *Hoodie and Winscomb's case*, 20 *Eliz.*

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sumes that the words of the power are not so clear and precise but that they are capable of more than one meaning: otherwise indeed the proposition would be self-evident. Many different sorts of powers are known to the law, some more beneficial, others less so: some are qualified, some are not: some are conditioned to hold the land till the rent is satisfied out of the profits, (*Co. Litt.* sect. 328.); some to hold till the rent is satisfied *aliunde*; some (as here) to restore the reversioner to his former estate (*Co. Litt.* s. 324.); others there are with the conditions which form the subject-matter of the objections to this lease, and which I have already noticed: some again (though very few) have neither of those conditions: and the question now for your Lordships' consideration, I apprehend, is, which of these powers, having due regard to the intent and meaning of the indenture of 2d July, 1757, that nstrument, according to legal construction, requires?

The intent and meaning of the indenture is to be collected, either from the indenture, intrinsically, without looking out of it; or from the contents of the instrument combined with the consideration of the state of the property at the time when it was made. And then arises the other question—whether the evidence of the then existing leases, and of the powers of re-entry therein contained, and which I shall presently consider, be admissible or not, not for the purpose of explaining, adding to, or varying a
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written instrument; but to shew the meaning of the language which the settlor has used in this requisition, which she has left quite indefinite and necessarily to be supplied by reference to matters extrinsic. Taking it first, however, without reference to any such extrinsic matter, it seems to me that the intent and meaning of the indenture *per se*, and without looking beyond it, or out of it, was, that the reversioner should have either of such of those powers as would give him a proper and reasonable security for his rent by way of re-entry. If nothing short of a right of immediate re-entry—whether there were a sufficient distress upon the premises or not—would give him that security. I might be of opinion that, in such a case, he would be entitled to have such a power inserted in the lease as would alone ensure to him that right. But if any of the other species of power would give him a proper and reasonable security, it seems to me, that the insertion of either of those other powers would satisfy all that the indenture of 1757, in legal construction of its meaning, requires. The rent is not a rack-rent; it is merely an old accustomed rent of only 2*l.* 1*s.* 6*d.* *per annum*, payable half yearly; and for a lease for three lives, the lessee surrendered a subsisting lease, upon which at least one life must have been in *esse*, and paid 10*s.* 9*d.* only: and such a rent was certainly not likely to occasion the reversioner much thought or care, as to any probability of loss of it; for he could not consider it possible that the premises would ever

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be so completely deserted as that there should be no sufficient distress upon them at any time: nor was the rent of such consequence as to make it probable that the tenant could, upon any occasion, be induced to replevy a distress. For such a rent, therefore, the power in question to re-enter at the end of fifteen days, if there were no sufficient distress upon the premises, appears to me an adequate and reasonable security; and I should be disposed to think that for such a rent, a clause of re-entry without giving any days of grace, would be unreasonable; because the immediate exercise of such a right would be oppressive. Nor do I think it unreasonable to restrain the reversioner from the enforcing the power of re-entry, whilst there should be a sufficient distress upon the premises; because the legislature did not think it unreasonable to deny the landlord the benefit of the 4 Geo. II. c. 28, where there was a sufficient distress: and the landlord can have no difficulty in ascertaining whether there be such a distress or not; for he has a right to enter daily with his bailiff upon the premises to see whether there be such a distress, and according to the case in *Godbolt*,\* if there be nothing that he can see upon the premises to distrain, he is warranted in concluding that there are no distrainable goods there. The words of the report are, "In that case it was holden, by all the Justices, that if a man make a lease, rendering rent upon condition, that if the rent be behind, and no sufficient distress upon the land, that then the lessor may re-enter; if the rent be behind, and

\* Ca. 130, p. 110.

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there be a piece of lead, or other thing hidden in the land, and no other thing there to be distrained, the lessor may re-enter; for the distress ought to be open, and to be come by; for if it should be otherwise said a sufficient distress, one might inclose money, or other things within a wall; and thereby the lessor should be excluded of his re-entry." I am therefore of opinion, that, without looking beyond the indenture of 1757, the power in question is conformable with the requisition, and within the true intent and meaning of that indenture: and that it is, in the legal construction thereof, as large and beneficial a power of re-entry, as that indenture required. I am of opinion also, that, in judging of the true intent and meaning of the indenture of *July, 1757*, in this respect, we are at liberty to take into consideration the state of the property at the time when that indenture was made, to see to what restrictions the lessees were then subject, and what rights the lessor then retained. The settlor having used the indefinite words, "a power of re-entry," by shewing, as I have done, that there are many such powers recognized by the law, I shew that there is an ambiguity in those words, whether latent or patent, which makes it necessary to refer to the actual state of the property at the time when the settlement in which those words were used was made, in order to discover the intent of the settlor, and in what sense she used those words? I have never before heard it doubted, whether the nature and the general mode of tenure of an estate, and the interest of the owner were admissible in

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proof to ascertain the nature and design of an indefinite power to lease granted by the settlor of the property. I am not by so doing, construing a legal instrument by the acts of the parties, or by their understanding of it; (as was done in *Cooke v. Booth* (a) but by shewing from the circumstances and situation of the parties, and the estate and interest which the settlor had at the time, I am enabling the House to judge what, in legal construction, was the meaning of the creator of the power in using indefinite terms—a question which sends so many cases from one side of *Westminster Hall* to the other: and I am not aware that there is any legal authority for excluding the evidence of such circumstances and situation for such a purpose. On the contrary, there are several authorities for admitting extrinsic evidence where the doubtful wording of an instrument seems to render it necessary to seek an explanation *aliunde*. In *Doe*, on the demise of *Allan, v. Calvert* (b), which was argued on a question, whether the lease there was a lease in possession or reversion; the custom of letting was given in evidence to shew that the periods mentioned in the *habendum* of the lease for the tenant's entry on the part of the premises then in question, were the usual periods of entry customary in that part of the country. That evidence was admitted without objection, and argued upon without objection: and that fact was held by the Court, who did not advert to its being inadmissible, not to have the effect of controuling,

(a) Cowp. 819.

(b) 2 East, 376.

on the principle of intention, the words of the power (which was to lease in possession and not in reversion) so as to get rid of the objection, that a lease dated the 29th of *March*, under which entry was to be made by the tenant as to all the ground, except the tillage, on the 5th of *April*, and 12th of *May then next ensuing*, was a lease in reversion, and therefore not warranted by the power. How that case bears on the question, so as to support the proposition, that the extrinsic evidence received in this case was inadmissible, I am quite at a loss to discover.

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In the case of one making a deed or will, have we not a right, when it is necessary to the understanding of it, as it frequently is, to enquire what estate he had at the time of executing the instrument? That is often a necessary fact to know, because the true construction often turns upon it, and may be wholly varied according to the result of the enquiry. I will put this familiar case: if one grant to another a lease for life, without expressing it to be for the life of the lessor, or of the lessee—is not evidence not only admissible, but necessary, to shew what interest the lessor had in the property at the time? for if he were tenant in fee, the lessee would take a lease for his own life; whereas, if the lessor were tenant in tail, or for life only, the lessee would take only for the life of the lessor. [His Lordship then adverted to the doctrine in *Sheppard's Touchstone*, p. 88.] So, where a testator gives a sum of money by the description of so much stock; if he have such

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stock, it is a specific bequest of that stock; but if he has it not at the time of his death, evidence may be received to shew that it had been transferred to some other fund, and the bequest would thereupon be established. That was acted upon in the case of *Schwood v. Mildmay* (a), where extrinsic evidence was admitted to shew that the testator had no such stock as he had bequeathed, having transferred it to another fund before his death. In *Masters v. Masters* (b), extrinsic evidence must have been admitted to have rescued the bequest there, from the effect of that uncertainty which would otherwise have rendered it void. I wish to call your Lordships' more particular attention to the case so much relied on by my Brother *Park*, of *Fonnercau v. Poyntz*. In that case the testatrix gave to *Mary Poyntz* the sum of 500*l.* stock in long annuities, the same sum stock to another person, and 200*l.* and 100*l.* stock in long annuities to two other persons, the interest of the two latter sums to accumulate till the legatees should attain twenty-one, and then the whole to be transferred to them by her executors: and she bequeathed the residue of her estate to her two nephews. The testatrix having only 120*l.* stock at her death in long annuities, parol evidence was there admitted (after it had been at first held by Lord *Thurlow* not to be admissible) to shew the actual amount of her fortune, and the state of her property (which was admitted to be external evidence) in order to enable

(a) 3 Ves. 306.

(b) 1 P. W. 425.

the Court to construe the will by the criterion of her intention, if it might be collected from the state of her circumstances. Lord *Thurlow* ultimately decided that the *peculiarity* of the will furnished sufficient doubt to warrant the admission of collateral evidence, to explain whether she meant to bequeath to the legatees a gross sum to accumulate, or that sum *per annum* by way of annuity: and on admitting the evidence, the same sum to be paid as an annuity, was found to be ten times as much as she was worth. Extrinsic evidence in that case, therefore, was received and acted upon to explain the meaning and intention of the testatrix as to these bequests, which were otherwise uncertain, and could not, in fact, have been established or satisfied. The Master of the Rolls afterwards (adverting to that case), in deciding *Selwood v. Mildmay*, says, " Lord *Thurlow*'s only doubt was, whether parol evidence was admissible to ascertain whether the testatrix did not mean capital; but he had no doubt that she must know all the circumstances of her affairs: therefore his first opinion was, that, though it did appear she could not mean to give so much more than she could afford, yet he doubted whether he could give the words a meaning so different from their natural meaning." Applying those principles to this case, the evidence objected to here must necessarily be held to be admissible on the same or stronger grounds; because it is not offered to set up a construction against the natural meaning and import of the words, nor to control or modify a power distinctly and accurately describ-

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ed; but to remove an ambiguity upon the face of the instrument which creates it, and which, by using general and indefinite terms, renders it capable of being satisfied in several ways. Therefore it is, that I think we may, in this case, look to the state of this property at the time when the settlement was made, in order to be enabled to ascertain, from the nature of her estate and interest in the property, and the circumstances under which it was usually demised at the time, what her intention was with respect to the sort of power which she was desirous of having introduced into the leases. From that extrinsic evidence we find the case to stand thus:—Lady *Louisa Barbara Mansel* being tenant for life, with a power of appointment in fee, of a very considerable estate, part of which was then let out upon leases for lives at small rents, payable partly in money and partly in a render of capons, or money at the election of the landlord: and those leases contained powers of re-entry “in case the rents reserved should be behind for fifteen days, and there should be no sufficient distress upon the premises.” She then settled that estate, amongst other uses, to her husband for his life, with a power enabling him to make leases of a part of the property which had been long before so let for lives, *so as* there should be reserved the *ancient and accustomed* rents; and so as there should be contained in the leases a power of re-entry for non-payment of the rent: and also with a power to make leases at rack-rent of other parts of the estate; so as they should contain powers of

of re-entry in case the rent should be in arrear for twenty-eight days. The true question, therefore, which arises upon these powers is, whether by requiring in the life leases, generally, a power of re-entry, she meant to require more than the same description of power with which the then existing life leases were burthened; and she must be taken to have known what that power was. Had she been dissatisfied with it, or desirous of making any alteration in that respect, is it to be supposed that she would not have used more definite terms in the requisition than these which she has contented herself with, requiring, generally, a power of re-entry? more especially when we see that in providing for securing the rack-rents, where the right of re-entry is obviously of so much more importance, she gives the tenant an indulgence of twenty-eight days. Can it be supposed that she intended to be less indulgent in respect of the small rents which bore comparatively no proportion to the value of the property? I cannot consider that she could have had any such intention.—Therefore—the settlor not having prescribed or suggested any particular species of power, as being required by her to be contained in the leases; and as the power which this lease contains is reasonable, and amply sufficient to answer every legal purpose: and being besides the very species of power which was at that time inserted in all the leases in force upon this estate—I submit to your Lordships, that this lease was warranted by the terms of the leasing power; and that, for these reasons, the original judgment

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ment of the Court of *King's Bench* ought to be affirmed.

WOOD, *Baron*.—In answer to the question proposed, (which he stated) expressed his opinion to be, — that the power contained in the marriage settlement was well executed.

[His Lordship having delivered his reasons for that opinion so nearly in substance in the terms of his judgment in the *Exchequer Chamber*, though not quite so fully, it would be superfluous to repeat them.] He concluded by saying, that, as the power of leasing leaves it to the discretion of the lessor to make a reasonable lease: and as the power of re-entry contained in the proviso is reasonable in its conditions, I therefore think that the lease is not invalid.

The House then adjourned till *Friday*.

*Friday,*  
*18th May.*

GRAHAM, *Baron*—preceded the detail of his reasons for the opinion which he was about to deliver, by stating the terms of the first leasing power, and particularly those parts of it which refer to the lands *then leased for lives* or years determinable on lives, and require as a condition that there shall be reserved in all such leases as should be made under it, the *ancient* and *accustomed* or *as great and beneficial* rents, duties, and services as were *then* reserved and made payable; and the other principal condition, that there should be contained therein a power of re-entry

re-entry for non-payment of the rent to be reserved—and he then read the words of the proviso in the lease. Now (continued his Lordship) how all these directions which we find in this leasing power were to be pursued without a general reference to the tenor of the former leases, I am at a loss to conceive. That reference was, in point of fact, had; and it being found that the leases uniformly gave the tenant a respite of fifteen days for the payment of the rent, and that there was also annexed the further qualification to the clause of re-entry, that there be no sufficient distress on the premises, whereby the arrearages of this half-yearly rent of one pound might be fully raised, levied, and paid; the framer of the lease of 1803 adopted the same form of reserving the power of re-entry in that lease; and the question now for your Lordships' consideration is, whether this lease, containing, as it does, a clause for re-entry for non-payment of the rent, with those same conditions annexed, is a proper and valid execution of the power given by the settlement. Whether it be so or not, depends, as I conceive, on the following considerations:—whether it be substantially conformable to the intention of the creator of the power—whether the objects of the annexed conditions are reasonable and legal—and whether, in their effect, they are injurious to the rights and interests of the remainder-man. If it be not admitted, that this power is capable of a liberal construction, (and I will not trouble your Lordships with cases to shew that such is the rule with

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with respect to the construction of such powers in general) at least it must be admitted, that common sense should prevail. Powers of this description pervade the settlements of all the great and opulent families in the kingdom, and on that consideration a slight or immaterial departure even from a strictly prescribed form ought not to be suffered to invalidate the execution of them. If there had been any prescribed form or mode of leasing pointed out by directions plainly expressed in this instrument, that mode could not be materially departed from I allow; for, where a prudent father, tenant for life, has provided by the execution of such a power as this for his younger children, where the eldest son would otherwise succeed to the bulk of the property — if a question should arise under such circumstances, the consideration of the state of the property would dispose you to give every effect to such a power as might best accord with the intention of the creator of it, rather than permit the reversioner, by taking advantage of an objection of this nature, to avoid the leases, to the prejudice of the lessee, or to the younger branches of the family against whom the lessee would be entitled to recover out of the assets of the lessor. So also would it be proper to consider whether any sensible inconvenience to the remainder-man must be the necessary consequence of the execution of the power in question, with reference still to the intention of the settlor. We are first to find out then what the creator of this power meant by the terms which she has used

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in expressing this condition to be observed in the exercise of it. She has required "a" power without prescribing in terms, any form of words, or any particular manner in which it was to be reserved. It is a very general direction, that the lease should contain a power *for* [*or because of*] the non-payment of the rent. So general a direction must leave the verbal exposition of the clause to further care, when it should become necessary, in putting it in practice, to give to it terms of greater precision; and no conveyancer could have framed a clause for re-entry in the very words: he must have in some respect or other made it more particular and precise. A power necessarily implies a selection of one out of several, and both the Common Law and the Statute have furnished different modes in which such a power might be drawn. Besides it is quite clear, from the general tenor of the instrument, that it was the intention of the creator of the power, that the person who was to make these demises should abide by the form in which the former leases had been made. This general direction necessarily calls, therefore, independently of any intention, for the exercise of judgment in the execution of the power—not of legal or definitive judgment; but of the fair discretion of the party to whom the execution of it was intrusted by the creator of the power.

It must be considered sufficient therefore if the lessor have provided such a power of re-entry as should be fit, suited, and adequate to the occasion,

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occasion, and to the legal objects of such powers, and be commensurate with them. And what are the objects of powers of re-entry as recognized at Law and in Equity? They are merely coercive means of enforcing the payment of rent; and that is now the only purpose for which such clauses can be intended, or for which they can be enforced; for Courts of Equity would never have suffered them to have been inserted for any other purpose. They would always enjoin the landlord from putting them literally in execution, whenever the tenant should pay the arrears of rent and costs. The remainder-man therefore cannot have been placed in a worse condition by the qualifications annexed to this clause of re-entry, than he would have been in by the Law, if there were no such qualifications inserted.

Then, in the faithful exercise of his judgment or discretion by the lessor in the execution of this power so generally worded, he would naturally consult his professional adviser; and he again would necessarily, upon reading the terms of it, resort to the former subsisting leases of the same property in order to ascertain the ancient rents, duties, and services, or the heriots usually reserved; for how otherwise could he do so? Could he, on reading these words, forbear to examine the former leases, where he would be sure to find the best information to direct him; and having found what were the usual rents and services, he must then consider of the fit and proper clauses to ensure them: he would then seek further

ther to learn by what provisions that had usually been effected, and if he met with nothing there to assist him in acting agreeable to this requisition, which is much too general and uncertain to follow literally, he might think he could not do better than take the statute of the 4 of *Geo.* the II. for his guide, and adopt the qualifications which were then considered both at Law and in Equity to be most reasonable as applicable to the execution of such powers. Whilst, however, I think that the execution of the power in the first instance was left to the discretion of the tenant for life, I do not say that his discretion, if not conformable with it in any very material respect, would conclude the Courts of Law; but I cannot admit that the validity of the execution of a power should be left to the consideration of a Jury, or the determination of a Court of Law, in the first instance, without leaving any thing to the discretion of the lessor, and the intention of the creator of the power. I am therefore clearly of opinion, that the former leases were properly taken as a guide by the person who was to execute the power: and subject only to the doubt entertained by very learned men, I consider them decisive evidence of what ought to be the true construction of this power according to the intention of the parties to the settlement. The decision of *Cooke v. Booth* (a) I am aware has been considered to be over-ruled by subsequent determinations; but I think that case very

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(a) Cowp. 819.

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distinguishable from this, because the Court were there required to put a construction upon a covenant sufficiently explicit in its terms, and without any ambiguity; whereas the terms of the requisition in this power could not be transcribed literally as a complete covenant, into a lease, without some qualification to perfect the power and render it practicable. The creator of the power has expressly required the old and accustomed leases to be consulted in many respects, and why should they not for the usual clauses which were necessarily to be engrafted upon the covenants for which that reference was directed. This extrinsic evidence therefore was not resorted to in the present instance for the purpose of explaining the meaning of the instrument, but as a guide to direct the party who was to exercise a judgment in preparing a further instrument, according to the general requisition of a power in the former as to the particular manner in which it was to be prepared; and where, without such additional particularity it would be impracticable in effect; but still so as to be conformable in substance, I admit, with the directions of the power in requiring such restrictions.

I will not involve the case by adverting to any of the facts in evidence which are beside the question, but proceed at once to the objection that has been taken to this lease. It has been urged, that there is an obvious difference between reserving a simple power of re-entry, and one which should be clogged with conditions not authorized

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authorized by the power to demise, qualifying the right reserved and impeding its execution. It is true these conditions are not made part of the requisition of the leasing power, in words, but I say they are in substance: nor do they in effect clog the right or impede its execution; but on the contrary, they are more beneficial to the remainder-man, and facilitate his only accessible rights, by removing the ancient Common Law difficulties under which he would have laboured, or the restraining power of a Court of Equity, if those qualifications had not been introduced. [His Lordship here enumerated the formalities attending the enforcing the right of re-entry at the Common Law, (all of which, he observed, must have been submitted to at enormous and immediate expence for the sake of a distant prospect of ultimately recovering a rent of one pound) and descanted on the advantages to the remainder-man of being placed in a condition to proceed under the statute.] I assume, continued his Lordship, that the object of the statute was to enable the landlord and tenant mutually to avail themselves in a more summary way of the benefits which the equitable jurisdiction of the Courts would previously have afforded them; but I have never understood that the statute intended the power of re-entry to be absolute. Now, what better guide than the provisions of this statute, could the maker of the lease in question have taken in the execution of the leasing power? When this settlement was made, the statute had been passed many years; and the beneficial effects of its operation must



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have been universally felt. The objects of the clause for re-entry for non-payment of rent therefore being merely and solely for the purpose of securing and enforcing the payment of it; and as it cannot by law be used for any other purpose, I am clearly of opinion that the inconveniences which have been pointed out in this case as the necessary consequence of the two qualifications which are annexed to this proviso for re-entry for non-payment of the rent reserved, can have no existence in fact; and that the introduction of those qualifications into the power of re-entry inserted in this lease, does not invalidate the demise.

As to the authority of the case of *Core v. Day* which has been relied on in support of the objection founded on the condition of there being no sufficient distress, I shall confine myself in my observations on that case to what has been said by the other Judges. I find that I have been reported to have expressed myself in terms of animadversion certainly much stronger than I could have intended, and I believe stronger than I did. All that I meant to say, and all that I think I did say, was, in substance, that the present case was very distinguishable from that of *Core v. Day*; and that the case of *Hotley v. Scot* was decidedly opposed to the doctrine said to have been established by that of *Core v. Day*, and particularly according to the note of the former case as taken by Mr. Butler. I said that I considered that an express authority, deciding, that  
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the qualifications of the power of re-entry, which form the foundation of the objections taken to this lease, did not make void a lease executed under such a power. Some expressions of disapprobation may have escaped me, and probably dicta of a doctrine contrary to that determination, and which I, for one, do not consider impugned by the ultimate opinion of the Court upon the facts of the case of *Coke v. Day*. Of the incidental dicta attributed to Lord *Ellenborough* in the course of the argument, which may be considered as adverse to the doctrine in *Holley v. Scot*, I might have observed, while contrasting the two cases and balancing the authorities, that that great legal character Lord *Ellenborough* would be more likely to overlook reasons founded on equitable grounds than Lord *Mansfield*; and all that I meant was, to have placed the two decisions on fair and equal terms, leaving the preponderance of either on, the equipoise, to their own due weight. Having stated the substance of what I meant to say upon the former occasion, I now add, that I entirely agree with one of my learned Brothers\* in considering, that a necessity having been imposed on the reversioner, that the rent should be lawfully demanded, was a deviation from the power which creates a very material distinction, and very much confirms my view of it. There are also these further very marked points of difference between the two cases. In *Coke v. Day* there were no such limitations of the particular estate as there are here.

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\* Mr. Justice Best.

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The tenant for life had power to let all or any part of the premises for short terms absolute in possession, without taking any fine for making such leases, reserving the best and most improved rents. There were there no terms of reference to the state of the property, or to former modes of leasing, or to ancient rents or services. There was nothing left to further judgment or discretion, and nothing extrinsic to be inquired of: and the lessor was not referred to, nor did he require any thing as a guide in framing the leases which he might grant under the power. All these circumstances of difference wholly distinguish the cases, and make it unnecessary to advert to the doubt thrown on the decision in *Core v. Day*, by the determinations in *Holley v. Scot* and in the present case. The question therefore may be considered as unfettered by decisive uncontradicted authority, either way: and I see no reason for changing my former opinion that this lease is a valid execution of the power.

RICHARDS, *Lord Chief Baron*, having stated the question, proceeded in substance as follows:—I entirely concur in the opinion which my Brother *Graham* has just delivered upon the question propounded to us by your Lordships; and I derive (as he has done) the reasons upon which my own opinion is founded, principally from the terms of the instrument by which the several leasing powers are given. [Here his Lordship stated the terms of the three powers &c., and the material facts of the case applying to the present question of the construction of the first.] Now what occurs to

to me as most material to observe with respect to the different conditions on which the three powers are to be exercised as explanatory of the intention of the creator of them with respect to the mode in which the power in question was to be executed, is this. In the third power—that which enables the tenant for life to make leases of the mines—we find that no clause of re-entry for non-payment of rent is required to be inserted. In the second power, or that which authorizes demises for terms of years absolute, the leases are required to contain a clause of re-entry in case the rent should be unpaid by the space of twenty-eight days. Such is the qualification of the power of re-entry expressly prescribed where the rent and the beneficial occupation run together and are co-extensive and to be considered of the same value. Then the power in question (which is the first in the deed) enables Lord and Lady *Vernon*, as either should become tenant for life, to demise such parts of the estate as had been before demised for lives or years determinable on lives for the same term, *reserving the ancient and accustomed, or as great and beneficial rents, duties, and services, or more*, as had been &c. Now it appears to me, as my Brother who last addressed your Lordships has already well observed, to be quite impossible to know what was to be done by the person who should have to exercise this power of leasing, so as to execute it conformably with the intention of the creator of it, without looking into the legal instruments then existing affecting the pro-

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perty of this family, and particularly the then subsisting leases, and all such papers as had been executed between the landlords and their tenants, regarding the various modes of tenure of the several parts of this estate, and the general state of the family property. [His Lordship then adverted to the proviso for re-entry on non-payment of the rent contained in the lease in question, and stated its terms and those of the two qualifications.] On the trial of the ejectment former leases were produced to shew that this proviso so qualified had been, on all occasions, introduced as one of the usual conditions on which this part of the property had been *accustomed* to be demised: and how could that usage be otherwise ascertained? I consider that that fact was material for the consideration of the Jury in such a case as this; and it was for that purpose fit and proper that they should look into the leases which were unexpired at the time when the deed of settlement was executed; and therefore it must, as a necessary consequence, be my opinion that those leases were properly admitted in evidence at the trial to prove the fact of such a proviso being usual and customary and conformable with the ancient practice in the family of demising the same property.

Now the words of the leasing power on which this question arises are, "And so as there be contained in every such a power of re-entry for non-payment of the rent thereby to be reserved." A more general power cannot well be expressed or conceived. The requisition is, without any qualification.

qualification. A power only is required, and that power is to be ~~for~~ non-payment of the rent, and not *on* non-payment, as was well argued at the Bar, which latter word might perhaps have been considered as having reference to the *time* of the accrual of the right of re-entry; (if that had been the word used) but the word is *for*, which must be taken to be used solely with reference to *the occasion* on which it was to be given.

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Now, in this case, where the lessee must have paid to the lessor, in consideration of his lease, the full value of his interest at once, at the commencement of the term, exclusive only of the small nominal rent of 2*l.* a year, is it to be supposed, that it was the intention of the creator of these powers to vacate in one instant a lease so granted for valuable consideration, for an accidental and trivially inconvenient default in the payment of so inconsiderable a rent, where the rent and the occupation run together? That construction would have the effect of putting such tenants in a much worse condition than those who had leases under the other power at a rack rent, and who were not to pay any thing until after they had enjoyed the possession of the premises, and were then to be indulged with an extension of the time for payment of their rent for twenty-eight days beyond the day fixed by their lease.

Lord *Vernon* then having occasion to exercise the first leasing power, and finding, from the settlement, that a power of re-entry was to be

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contained in the lease he was about to make, inserts therein, in the execution of the power by which he was authorized to make the demise, the proviso contained in the lease in question: (the terms of which his Lordship stated).

The question arising upon that, and which is now for your Lordships' consideration, is, whether that proviso is agreeable to the terms of the leasing power given to him by the settlement. Two objections were made to it on the part of the lessor of the plaintiff. One is, that the time for re-entry for non-payment of the rent has been extended in the proviso fifteen days beyond the time authorized by the power; whereas the right of re-entry should have been immediate and absolute. The other is, that the power of re-entry is required to be reserved without reference to any condition; whereas there has been superadded to it in the proviso a condition, that the lessor or reversioner shall not be permitted to re-enter so long as there is a sufficient distress upon the premises. My Lords, the answer to those objections, as it appears to me is, that it is clearly established, that in the construction of all powers we are to be governed by the intention of the parties creating them; and that intention must in all cases be collected from a fair interpretation of the language in which they are worded. In this case, all that we can collect from the words of the power is, that it was the intention of the parties to the deed that there should be a power to re-enter, contained in the leases to be made under the

the power, in the settlement now under consideration. The words are too general to afford any precise directions respecting the execution of it; and therefore, the fair exposition of it must be collected from the situation of the parties under all the circumstances attending the state of the property at the time when the settlement was made. (His Lordship then adverted to the circumstances of the case, and continued :) Now the object of the creator of the power in this case—as it is to be gathered from the settlement, when expounded according to those rules by the terms of the instrument, regard being also had to the facts—was clearly, as I think, to have the new lease planned on the old and accustomed terms of the former leases. One of those terms was, that there should be a clause of re-entry similar to the present for non-payment of the rent, as we find from the fact of such a clause having been uniformly inserted. It has been ruled in many cases, that courts are to be more liberal, if any inclination may be allowed in construing leases made under powers, rather in favor of the lessee against the lessor, where the power proceeds from the owner of the inheritance than where it proceeds from a stranger; and it has been contended, in argument, that that distinction is to be taken in this case; because the estate originally moved from Lady *Vernon*: so that Lord *Vernon*, the tenant for life, who made this lease under the power given to him by her is to be regarded as a stranger, he having originally no interest in the estate; and that there-

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fore his acts are to be construed more strictly against the lessee, and in his own favor, than if he had been originally the owner of the estate. But we find here, by looking to the uses of the settlement, and I beg of your Lordships to observe this, that the same power is given in the same terms to Lady *Vernon* in each particular instance. Therefore, the power, though exercised by Lord *Vernon*, must be construed in the same way as if it had been exercised by Lady *Vernon*: and if so, we must therefore consider this lease, as if it had been executed by the person from whom the estate originally moved, and who may fairly be considered as in a situation similar to the case which I am about to suggest and upon which some of your Lordships can have no doubt. Now, let us suppose that a landlord having a fee simple in his property, should enter into an agreement in writing with his tenant to grant him a lease on certain conditions; and one of those was, that it should contain a power of re-entry for non-payment of the rent to be reserved. If it should afterwards become necessary to file a bill in Equity for a specific performance of that contract; a Court of Equity would, upon making a decree for a lease, order it to be referred to the Master to settle the terms in which such lease should be framed. Can any one doubt, that on such a reference, the intention and meaning of the parties to be collected from all the circumstances of the case, ought not to be considered. The question of intention would be the only guide where the words are the same or as general as those which

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are used in this power. The Court of Equity would order the power of re-entry to be qualified with usual and reasonable conditions, such as the qualifications of the present power are. They would unquestionably extend the period for re-entry to a reasonable time beyond the day fixed for the payment of the rent, referring, at the same time, to a sufficiency or insufficiency of distress, as in the present lease. I mention this case of an agreement, because it seems to me to apply very closely to the case before your Lordships. Courts of Equity adopt the same principle and practice in hundreds of instances, such as leases by guardians, of infants, committees of lunatics, and the like. The Court so acts because it will execute the intention of the parties: and a Court of Law in construing powers is equally bound to adopt the intention of the parties creating the power; nor is there any difference recognised in Courts of Equity between powers and any other instruments in their effect and operation. If, therefore, Lord *Vernon* had agreed to grant a lease according to the terms of this power, and a bill in equity had been filed for a specific performance, and the prayer of that bill had been decreed; the power of re-entry, required to be inserted in the lease, would have been drawn up in the Master's office, qualified, as this is, with the conditions now objected to, as being the usual terms. The Court would, I doubt not, direct a lease to be executed with a power of re-entry, upon the usual and reasonable terms which should be according to its construction agreeable to the intention of the parties

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parties creating the power, and I presume, the lease to be executed under the orders of the Court, would be similar to that which has been executed in this case. I am the more willing to refer to the proceedings of a Court of Equity, because I am speaking in the presence of those who have perhaps more knowledge and experience than any persons of the present or former times. If then the Court of Chancery would have directed a lease to be made under these circumstances in precisely the same terms, how can we now say that this lease is invalid, because it contains these conditions? I understand too, for I am unwilling to advert to my own experience, that the practice of conveyancers in respect to the clause of re-entry for non-payment of rent has always been uniformly consistent, in giving an extension of the time beyond the day of payment; and that practice is founded on an assumed intention of the parties. For that reason the most eminent conveyancers, as we find from the established precedents, have ever been in the habit of extending the time to any such number of days as under the circumstances they may have considered reasonable: and although so delaying the payment may in some cases be contrary to the strict terms of a power; yet it has always been done, and it would be a just course even if it were not the universal practice. The uniformity of the practice of proceeding on the intention ascribed, affords strong evidence of its acknowledged propriety; and it is so inveterate that it would be highly dangerous now to affect it; and I have ever understood that the Judges have always considered an universal

versal or even a very general practice amongst conveyancers a sufficient ground for their decisions; although they might not have entirely approved of the principle on which that practice had proceeded. On that point, therefore, namely, the extension of the time, I am of opinion that this lease is valid; and that the proviso for re-entry contained therein, is a good execution of the power. I have always been strongly inclined to support the lease against that first objection on these grounds, and I think that it ought not to prevail.

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As to the other ground of objection I have not been able to learn that any general understanding, respecting the practice of inserting such a condition in similar clauses, in respect of the execution of powers, has prevailed among conveyancers, nor can I find that any decision has taken place by which I must consider myself bound, in a judicial point of view. In the absence of all authority therefore I must confess that the very strong and able arguments, which were pressed upon the point, had at first certainly very considerable influence on my judgment, and induced me to form that opinion which I have before given upon this case. But on further consideration, I am glad to find myself compelled by more mature deliberation to retract the opinion which I had then formed; because I now incline to think, that those who then differed from me, in holding this second objection to be also unfounded, entertained the more correct view of the case; and I feel great consolation in thus having the opportunity of doing so. Notwithstanding

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withstanding it is very true, that the condition now in question would subject the reversioner to some inconveniences—and that was a consideration which, in the former occasion, weighed very considerably with me;—yet if I am right, is now holding this lease to be a good execution of the power, on the ground that it is conformable to it, regard being had to the intention of the creator of the powers on the first point (which was that the right of re-entry to be reserved was to be *reasonable* in its terms), there is nothing to prevent us from enquiring further, as to whether this other condition also, the absence of a sufficient distress, be not equally a reasonable qualification: and if it be, we must then hold, that that is likewise within the intention of the creator of the power; and therefore conformable to the terms of the requisition. Every man's experience informs him, that such a qualification of the clause of re-entry is usual in leases in general; and therefore it must be considered to be a reasonable qualification. Then the presence of the same condition in all the preceding leases which were given in evidence, proves, that in the estimation of the family it was deemed reasonable and proper, according to their construction of its import. The deed too, which gives the power to demise, requires the insertion of a power of re-entry in the leases, in the most general terms, requiring indefinitely a power of re-entry *for* non-payment of rent, and specifying no mode in which that power is to be reserved: neither prescribing nor prohibiting

ing any qualification or condition; but leaving it entirely open to the discretion of the lessor. Then we find; that in point of fact, this lease does contain a clause, giving a *power for re-entry for non-payment of rent*: and under a requisition in terms so general and indefinite; I cannot but consider, that a power of re-entry, with the usual and reasonable qualifications, would satisfy the condition on which such leases were to be made. By such a power of re-entry all which the law requires to be exacted is security for the payment of the rent: it is, as it were, penal; and these qualifications are no more than conditions which the law would require to have failed, before it would enforce the terms of the power; and if so, the conditions, upon which alone this power could be enforced, are reasonable and proper, and therefore not inconsistent with the power to demise. The reason and object of those conditions are quite obvious. The power itself being only to secure the payment of rent, a Court of Equity, acting on reasonable grounds, has always held it to be satisfied by payment of the rent in arrear, and costs; because the clause being merely to secure the rent to the reversioner, it ought not to be permitted to destroy the interest granted to the lessee. Such was always the principle on which Courts of Equity acted; and now the Legislature (by the stat. of the 4th of Geo. the II., an act expressly passed in aid of landlords) has transferred it into the law, which must be considered as a legislative recognition that the condition of the clause is reasonable and proper, and it

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it ought to be a sufficient authority for sanctioning its insertion in the execution of a general power to demise, requiring only a clause of re-entry for non-payment of the rent.

I beg here again to request your Lordships' attention to the observations which I have before made on the proceedings of Courts of Equity; as they apply to this head as well as to the former. I concur in saying that those Courts would direct a clause similar to that which is now in question. Now let me suppose that this had been a lease granted by Lady Vernon, in which case it has not been denied that it would be according to the power; because, as the estate moved from her Ladyship, she would not have been a stranger; and as the construction of the power would then be more in favour of the lessee, the lease, in its present terms, would be considered to be valid: and there can be no different construction of the same words; for the construction, in both cases, must be on the intention ascribed to the parties who used them in the settlement. Then the lessee is a purchaser, for valuable consideration, under that settlement; for he has paid the value of the estate, proportionate to the term demised to him, except the small rent and the duties; and we are therefore bound to protect his interest, if consistently with the terms of the power, and the circumstances of the case, we can do so: and most assuredly, every Court must feel inclined to support the lease, which has been executed by Lord Vernon to the plaintiff in error. The clause objected to is reasonable, and perfectly

perfectly calculated to secure the rent—it is inserted in all general leases—it is sanctioned by Parliament—it is, as I concur, agreeable to the proceedings in Courts of Equity, which act on the intention of parties, collected from the instruments executed by them—and it is consistent with all the other leases in the family, made under similar powers.

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Under these circumstances, therefore, I confess, that on further and better consideration of the question, I am of opinion that this lease is valid: and that it is, as now worded (but that in any other terms it would not be so) a good execution of the power, according to the intention of the parties to the deed of settlement.

DALLAS, *Lord Chief Justice (C. B.)* In answer to the question which your Lordships have been pleased to propose to the learned Judges, I am of opinion that the lease in question is invalid, as not being a good execution of the power.

Two objections arise for your Lordships consideration. The first is founded on the extension of the time for payment of the rent by fifteen days: the second, on the clause providing that there be no sufficient distress. The case has been argued at the Bar, and considered by the learned Judges, on the double ground of authority and principle, and to each of those grounds I shall separately advert.

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And first as to the fifteen days—I consider that on that point this case is untouched by authority, at least that there is no decision, entitled to be regarded as an authority, governing the case before your Lordships. The single case cited (from *Willes*) is of a negative nature, that is, it is one in which, although other objections were taken, this was not. On that case I think, with great deference, a great deal too much stress has been laid; for without saying, at present, whether the objection be well or ill founded—good or bad, intrinsically considered, I will only observe, that when it is seen how it weighs with many learned persons, now that it is taken; it seems to me that it is going a great way indeed to assume, that, if it had been taken formerly, it would not have succeeded; and much too far to infer, that not having been taken, it is to be considered as proof that, by common consent, it was treated as not fit to take. The more natural and rational supposition I should apprehend to be, that it was not adverted to at the time; at least, this is the opinion I should form; for I know not on what legitimate ground of reasoning we can assume, that what appears to be deemed so important now, was considered and rejected as utterly unfounded then.

Still, however, giving to that case all the weight it is fairly entitled to; it is admitted to be but negative authority. And the question now occurring and requiring positive decision, it must be examined and determined on express authority, if there be any; or if there be no authority, then

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on principle. Such then being the only case to be found applying to the objection founded on the fifteen days, I will next consider the authorities applying to the provision as to there being no sufficient distress.

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Here again, in support of the validity of the lease, one case only has been cited, as bearing directly on the point, viz. *Hotley v. Scot*. On that case I shall not waste time by dwelling longer than, in this last stage of the discussion, I feel to be necessary: and therefore, as to the imperfection of the report—the character of the reporter as such—the insufficiency of the reasoning as reported—and the other grounds of objection made by some of the learned Judges with whom I agree in opinion, to these I shall merely refer: repeating only for myself what I said upon a former occasion, and am not disposed, on reflection, to retract. The particular point now under consideration does not appear to have been adverted to then in the decision, reported as it is; still as it must have been different if the objection then and now made had been deemed valid—I think that in fairness I must take it, such as it is, to be a case adverse to the opinion which I entertain. Taking it then as such, and trying it as authority upon the ground of objection to which at present I am addressing my observations, the extension of the time to fifteen days, the first objection to it is, that it is a single case not professing to be grounded on any that had preceded it, nor appearing to have been supported by any that have followed it; but, on the contrary, the only case which has

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since approached the question—that of *Coxe v. Day*—is in *direct* opposition to it; for so I consider it, and for reasons which I shall presently give. I need scarcely add, that a case—dissented from as it now is by so many of the learned Judges, admitted to be inconsistent with the decision in *Coxe v. Day*, and at all events confessedly at variance with the observations and reasoning of Lord *Ellenborough* throughout the whole of the argument in that case—can scarcely, as mere authority, be considered of much avail.

In opposition to *Hotley v. Scot*, as I have said it appears to me to be, is the case of *Coxe v. Day*. But here again I wish to deal fairly with the whole subject of authority. And though to a certain degree, and to what degree I shall presently examine, that case must be permitted to operate; still, I think, it is not to be relied on strictly as a perfect authority even in favor of my view of the subject: first, because if *Hotley v. Scot* be rightly reported, it would be in opposition to *Coxe v. Day*; and thus we should only have case against case: and further, with respect to *Coxe v. Day*, of the two learned Judges of the Court of *King's Bench* who now support the judgment of that Court, it is disapproved of by one as to the grounds on which it stands, and expressly and in terms dissented from by the other: and, lastly, because, being a decision of the same Court by which this case was in the first instance decided, if it be distinguishable, as it is contended it is, then it does not apply; and, if not to be distinguished, nothing
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of authority can result from two cases decided by the same Court in opposition to each other.

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To dispose therefore of the whole subject of authority, it appears to me that, though these cases, as cited, have afforded much matter for observation and argument, they furnish nothing like authority, when correctly considered in a judicial point of view.

A word or two only, before quitting this part of the subject, on what has been much relied on as applied to the objection of the fifteen days, namely, that the prevalence of such leases, which are according to the general practice, is to be taken as evincing, it is said, the sense of the profession: and that great mischief will result from now holding the objection to be good. I admit that such topics would be of much weight undoubtedly; unless, if when strictly examined, the practice should be found to have crept in against principle; (and it is not pretended to depend upon any positive authority) but I can only say, that being bound to decide upon the objection now that it is made, I must do so upon principle: and if principle and practice are at variance, practice must give way; and in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for, and applied elsewhere. This, however, at most confines itself to the objection as to the fifteen days; for, with respect to the clause of distress, it is not pretended to be founded upon universal usage or practice,

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and the only decided case (*Core v. Day*) is directly the other way, holding the introduction of such a condition to be an abuse of the power, and that therefore it renders the lease void. As far as the argument in favor of the extension of the time to fifteen days is founded on the general practice, I admit it must operate in proportion to the length of time and number of leases, in the course of which that practice has been adopted; and that becomes, for that very reason, and in precisely the same proportion, stronger against the clause as to distress, inasmuch as in all such leases no such clause is to be found; and my Brother, *Holroyd*, to whose labour of research and profundity of learning we are all of us at times so much indebted, has informed your Lordships, that, after a laborious search, he has not been able to find in the old Books of Precedents more than one instance of such a clause in a lease, and that not appearing to have been followed up in common use. Practice in its favor is therefore not only wanting, but practice is in that respect the other way; and upon that point practice and authority go hand in hand.

Having made these observations on the authorities, I come now to consider the case on principle. And first, I admit, that—if the power be to be deemed indefinite as to time, and therefore to be exercised in a reasonable manner, leaving it to the discretion of the party by whom it is to be executed, to decide what is reasonable—it does not appear to me, that giving fifteen days in the way

Way in which they are given, can be considered as unreasonable. In truth, I deem it quite immaterial to any real interest of the parties, or as to any substantial effect, whether twenty shillings are to be paid by the one and received by the other fifteen days sooner or later. And so I apprehend the party might have thought, had his attention been drawn to the point. But when I am told of what the party really intended, as of an independent and substantive intention, collateral to the instrument itself and pre-existent, having caused the power to be framed precisely as it is, I can only say I take the probability to be, if we could look to the mere matter of fact, that the party himself never entertained precise intention of any sort on the occasion. It is said that the substantial purposes were to be accomplished; and that the detail of execution was of course left to others. But this supposed intention may account for all the difficulties that have arisen. Drawn as the power is, it was probably supposed, by professional persons, that the former leases might be looked at, and the clause in question being found there, was therefore adopted, and I agree reasonably adopted if such leases were to govern or might govern; but, whether they were so to govern or not, is one of the questions in this case, and which, if decided in the affirmative, would support the lease against this objection as far as it goes; and even if decided the other way, the case will still depend on the other general grounds, and the lease may, notwithstanding that objection, be got over, yet be deemed invalid. Fifteen days, therefore, if

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time might be given, I admit I should consider as not unreasonably given, if we are at liberty to form any opinion in this case as to what were reasonable; but that it is which I consider we are not left at liberty to do by the terms of this leasing power. In like manner as to the clause of distress, I see no actual injury likely to result from it in this particular case. I agree with several of the learned Judges, that it is not probable that twenty shillings of half-yearly rent would be suffered, if demanded, to remain in arrear; or if in arrear, that in the case of leases upon fines, a distress to the value of twenty shillings would not be found. But that is a way of trying this question which is precluded by the very nature of the question itself. The providing for a particular event not only pre-supposes the possibility, but even the actual occurrence of such event: it pre-supposes it, purposely to provide for it; and it anticipates and adapts itself to it. The question, therefore, arises on what the parties have said and done, not on the reasonableness of doing it, or on the sufficiency or insufficiency of what may have been done, the weight and value of which we are not at liberty to consider; and therefore, without looking out of the instrument, but to the instrument alone, and searching in it for the intent to be collected from what is there expressed, if sufficiently expressed, we must treat the question as your Lordships desire us to treat it, that is, as one of construction arising on the terms of the instrument, such as it is, as to what is the legal effect of the power authorising the lease;

lease: in other words, whether the terms of the lease being compared with the power in the deed, it is a good execution of it: and I agree, that in looking to the power, the intention of the party must govern, as it is to be collected from the whole instrument construed fairly and liberally.

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First then, the power directs a clause of re-entry for non-payment of rent, and for that merely. Nothing is said as to time — nothing as to distress — nothing as to what is reasonable — nothing as to what is usual — nothing, in short, that refers to any former lease or leases in any way whatever, so as to furnish a rule. The words “ancient” and “accustomed,” are terms to be found in the power as words of reference applying to the rent required to be reserved; but we nowhere find the words “reasonable” and “usual,” as applicable to the terms in which the power of re-entry is to be reserved: and therefore I think the leases are only to be referred to for the purpose of ascertaining what were the ancient and accustomed rents; but not for the terms in which the clause for re-entry was to be worded, or for any thing else. In the other powers we do indeed find the words “reasonable” and “usual;” but we find them unconnected with any reference to former leases, and inserted for other objects and purposes, very distinct from the object of the required power of re-entry.

Then as to the time appointed for payment of the rent. That time may be as definitively fixed by the happening of an event as by any express specification

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specification of a given period, cannot, I think, be denied: and if rent be made payable on a particular day, connected with a clause of re-entry for it if not paid, I can only understand it to mean if not paid on the day when made payable. In this there is nothing ambiguous—nothing deficient—nothing to be implied—nothing to complete what is expressed. It has not been argued that if the lease had been drawn in the very terms of the power it would not have been a due and valid execution of the power. But it has been said, that the rent to be reserved under the first power is merely nominal, and it has been asked—because in the same instrument twenty-eight days are given for payment on the leases at rack-rent, which are a substantial and heavy rent, before forfeiture can attach for non-payment—could the party intend a provision so preposterous and harsh as that a forfeiture should become the immediate consequence of a half-yearly rent of twenty shillings falling into arrear? To that I answer, that this suggestion of harshness appears to me to be mere imagination, and nothing more; for what of real harshness is there in making an estate liable to forfeiture upon non-payment of a sum so small as from its very smallness not to require time to be given to pay it. Fifteen days were scarcely necessary to put a party into condition to pay twenty shillings: and further, why it should be left to the person who was to receive the rent, to judge of what time was to be given, where no time is mentioned, rather than where the party has herself extended it to twenty-eight days, I am altogether at a loss to conceive. If I were at liberty

berty therefore to conjecture as to the intent, independently of the words made use of, my conjecture would be, that the maker of the deed intended that there should be an indulgence given where the rack-rent was reserved, and therefore she so expressed herself; but that as to the small rent she meant nothing of the sort, or beyond what she has said, and therefore was intentionally silent, whereby she has excluded the possibility of supposing that any time was meant to be given, still less that she had left it open to the discretion of another to decide for her what she could quite as well have decided for herself. In the particular case perhaps the time may be of no material consequence to the parties either way; but as applying to future cases, and involving principles applicable to the construction of all instruments, it becomes of real magnitude and importance, and on that account it weighs very considerably with me in forming my judgment on this case. It is not in the operation of the clause, as it would apply to the lease treated as a valid lease, that any difficulty arises; but in the application of the lease to the power with a view to try the validity of the lease. But for the sake of the argument I will suppose the question to be, whether the power might not, from its general terms, be so construed as to imply a reasonable discretion to have been intended as to time; although that would be begging the question, making the power, in that view, a definite and not an indefinite one—in such case I would ask, who is to judge what would be a reasonable time. Overlooking for the present all the other difficulties that arise on this


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this point, if I were to take for answer—the competent tribunal according to the nature of the case—it must then become a question what would be the competent tribunal? On the trial of this ejectment was it the Jury or the Judge? and again, if in the result it were possible to ascertain which of the two might be the competent tribunal, still that result could only be attained as now, through the means of a doubtful and ruinous controversy. This uncertainty as to tribunal, with the additional uncertainty as to result—that result depending on the uncertainty of opinion, which must necessarily be different with different men, of which these proceedings have in every stage, and this day in particular, afforded ample proof and furnish a striking instance—are sufficient ground for rejecting so mischievous a notion. On the other hand, all inconveniences introduced by holding the power to be indefinite, might and would have been at once avoided, simply by framing the proviso in the lease in the plain words of the power. One way it would be certain; the other opens at least to much question: and it is this substitution of uncertainty for certainty—this vague rule of discretion that throws open the gate to litigation which otherwise would be closed and fastened against it that constitutes my fundamental objection so to understand and so to construe this power. If therefore the question were, whether the term reasonable should be implied or not, I should hold that it ought not to be implied, even if we were at liberty to imply it, in a power framed as this is. Out of the very difficulty in which we are at this moment involved my objection

tion grows ; and if there were hardship in the case, and it could not be got over without breaking in upon rules, I say that hardship must remain. On that objection I think the lease, not being conformable with the power as worded, is not valid.

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I come now to the second objection ; and though in one light it is the most material, yet it will not be necessary in this last stage of the proceeding to discuss it at any length—I mean the restraining the right to re-enter to the case of there being no sufficient distress to be found on the premises. With respect to this, all I have hitherto said as to time applies with increase of force. It is a further clog not warranted by the original power, and it is one which does not rest on a possible speculative injury merely. The case so often referred to in the *Exchequer* (a) affords a practical comment on the nature of such a condition ; for when resorted to as a remedy, it shews the wrong which may result. The lessor of the plaintiff failed there, because some obscure corner of the premises had not been searched : and what right has the tenant for life to expose the remainder-man to such peril ? That case is precisely this, and in a similar proceeding the effect would have been and would again be the same. Then in support of the validity of this objection, the case of *Coxe v. Day* is, as I think, in point. It is so, as I conceive, in the decision—it is so beyond all doubt, in what was said by Lord *Ellenborough* in the course of the argument throughout the whole case, and which

(a) *Rees, d. Powell v. King*, Forrest, 19.

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leaves no room for inference. Whether that case may be fairly distinguished or not in any respect I have already examined, and will not repeat.

The argument drawn from the statute, and from the general notion of such a clause being considered as a mere security for rent, was brought forward then as now ; but it was mentioned only to be over-ruled, the point not appearing to the Court to be sufficiently tenable to admit of discussion.

To one or two other points I shall now shortly advert. I can scarcely think that the question can be reduced to one of mere verbal nicety ; but if it were, I cannot myself perceive the difference taken in this case between “on” and “for.” *For* non-payment of rent I consider to be equivalent to *on* non-payment of rent ; I have however no hesitation in admitting that “on” and “for” may be sometimes different and sometimes synonymous in sense, this depending on the context and the subject-matter. But looking at the subject-matter, and taking the whole of this instrument into consideration, I think there is no reason for distinguishing them on the present occasion. In like manner as to the term “beneficial,” I conceive it to refer to the lessor or the remainder-man, and not to the lessee ; and being so understood, if there be any weight in the observations I have hitherto made, such a reservation would be less beneficial to the lessor than the direct clause, unclogged with any conditions as to time or distress. On the argument, that under the words of reference to former leases  
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reservations, which it was contended must be taken to refer to them for all purposes, and that therefore those former leases might be looked at, it seems to me that argument turns the other way. The power directs that there be reserved the ancient and accustomed rents, or as great and beneficial rents, duties, and services, &c. thereby letting in, I admit, the former leases as evidence of what rent was ancient and accustomed, and so as to duties and services; but the deed following up those general words with special and particular words shewing the reference was not intended to affect the clause as to entry, there being particular words specially providing for this right, and in terms directing how it shall be reserved, it must be taken to exclude them for all other purposes. Having mentioned the former leases as admissible only in these respects, I will merely further say, I think they were not admissible, except for the purposes as to which they expressly or by necessary implication refer. This is indeed a necessary consequence of all I have already said, and without therefore going at large into the wide field which the argument in this respect has occupied, but referring generally to the opinions and reasoning of those who think as I do, I will merely state the broad ground and leading principles of law on which I found my opinion, which are—that, there being no ambiguity in the terms of the deed, and no mention of any time to be given; nor any reference to former leases, as connected with this subject; nor any such generality of expression as to let in extrinsic evidence to restrain or qualify or to exclude; but as all is expressed

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pressed with a clear, specific, and definite sense and meaning, such evidence is not admissible. This conclusion, it will be admitted, must follow if the premises are well founded; but whether they are or not, depends, as far as my opinion goes, on the validity of the general grounds on which that opinion rests, and of which it is for your Lordships ultimately to judge.

ABBOTT, *Lord Chief Justice*. I am of opinion, that the demise of the 5th of *September*, 1803, is not invalid. Your Lordships are now so fully possessed of the general and even the particular powers contained in the settlement out of which this lease was derived, and also of the clauses that are contained in the lease itself that I shall forbear to trouble your Lordships in reading that short abstract of them with which I had provided myself.

The objection upon which it is now sought to avoid the lease, is, that the clause of re-entry for non-payment of the rent is not such as is required by the settlement, and this for two reasons. First, because it allows to the tenant fifteen days for payment of the rent beyond the days mentioned in the lease: and, secondly, because it is restricted to those particular instances wherein no sufficient distress or distresses can or may be had or taken upon the premises, whereby the same and all arrearages thereof, if any be, may be fully raised, levied, and paid. This objection is certainly *strictissimi juris*, and as such is by no means to be favoured; though, if the *strictissimum jus* be found upon due consideration

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to be with the objector, a court of law is bound to yield to his objection. As I have already intimated, I think the right, in this case, is not with the objector.

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In the course of the argument at the bar, your Lordships' attention was called to a supposed distinction in the construction of powers, between such as are created by the owner of the inheritance, limiting a partial estate to himself, to be exercised by himself as owner of such partial estate, and such as are created by the owner of the inheritance to be exercised by a stranger to whom he may have limited a partial estate, or to whom he may have given the power as a naked power unconnected with any estate in the land. Such a distinction appears inapplicable to the present case, because the owner of the inheritance has here limited a partial estate, first to a stranger, and secondly to herself, and the words of the power must have the same meaning, whether the question had arisen upon an execution thereof by the stranger or by herself. It was also argued that the power of leasing being for the benefit of the tenant for life, the qualifications and restrictions imposed upon the exercise of the power are for the benefit of the remainder-man, and therefore that the clauses of qualification and restriction are to be construed most beneficially for the latter. This point also appears to have little weight, in the present case, because adverting to the amount of the fine paid upon the surrender of an existing lease, and to the amount of the rent reserved, I think it cannot be supposed that the



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purchaser of the present lease would have given one farthing less if the clause of re-entry had been strictly confined to non-payment of the rent at the very day, or that the estate of the remainder-man would now be worth one farthing more if the lease in question had contained a clause to that effect, instead of the clause upon which those objections have arisen. And being of opinion that the tenant for life could derive no benefit, and that the remainder-man sustains no prejudice as to the value of his interest from the form in which the clause of re-entry is framed in this lease, I think a court of law may reasonably regard the interest of the tenant—the purchaser of the lease—and put such a reasonable and liberal construction upon the words of the power in the settlement as will give effect to the lease rather than yield to critical forms and subtle objections, adduced for the purpose of defeating it. And this becomes the more important if it be true, as has been suggested, that very many leases are in existence containing clauses similar to the present, and derived from powers expressed in language similar to that of the power from which this lease was derived. Considerations of this nature certainly ought not to controul or vary the sense of plain and unambiguous words, but they may be reasonably entertained for the construction of words of doubtful import—not merely by reason of the consequences of a decision in a particular case, affecting numerous other cases of the like nature—but because the fact suggested is evidence of the general opinion entertained by professional men upon the meaning of the words
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of a legal instrument. These words, in the present case, are "a power of re-entry for non-payment of the rent to be thereby reserved." And the first question is, whether these words may be understood to mean a reasonable power, or must be confined to a strict power, without any conditions, which the landlord may exercise if the rent be not paid at the very day, and without regard to any property to be found on the devised premises, upon which he may levy his rent, and thereby compensate himself at his tenant's expence, for his tenant's neglect. If the words may be understood to mean a reasonable power, the only remaining question will be, whether the power of re-entry, contained in this lease, be a reasonable power. I shall therefore proceed, in the first place, my Lords, to shew, that, in my opinion, the words in question may be understood to mean a reasonable power. Non-payment is a mere neglect or default: and if the words "a power of re-entry for non-payment of the rent" are to be taken strictly and *ad literam*, they will import a power of re-entry for the mere neglect or default of the tenant; but this cannot possibly be their legal import or effect; because by the common law of England, a landlord never could enter for the mere neglect or default of his tenant in this respect, under any power or clause, in whatever language expressed. Some act is always required to be done by the landlord in order to entitle himself to exercise his power: and this is required, to prevent the tenant from being surprized or injured. This act, at the common

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law, was an actual demand of the rent on the part of the landlord; and the common law required this demand to be made in a most precise and peculiar manner. It was to be made just at the close of the last day of payment (allowing the tenant the whole day to prepare his money) at a time when so much day-light remained as might be sufficient to view and count the money, and no more. It was to be made at the door of the demised messuage, if there were any on the premises; and if there were none, then at such usual and notorious place of resort, where the tenant might reasonably be expected to be found, if he was not altogether absent; and it was to be of the precise sum then accruing due, not including any former arrears, all of which, although due, and recoverable by distress or action, were considered as waived by the landlord, on a question of forfeiture by his prior neglect to demand or enter for them. Then if the words of the power, or rather of the qualification of the power, contained in the settlement, cannot receive a literal construction, and be held to apply to a case of neglect or default only according to their literal purport, they must receive some other and different construction, which must, in my opinion, be a reasonable construction, and a construction properly suited to the object and purpose in view, that is to secure and enforce the payment of the rent; so that, on the one hand, the tenant may not hold the land without payment, to the prejudice of the landlord, nor, on the other hand, be dispossessed of it, if either himself or the land, which

which is emphatically said to be debtor for rent, presents payment, or the means of payment, without unreasonable delay or prejudice to the landlord.

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It has been objected, however, that if the literal or strict meaning of the words be not adopted, no other meaning can be; because, as it was said, Courts of Law cannot say what is a reasonable power, or clause of re-entry. But I conceive that in this, as in all other cases, Courts of Law can find out what is reasonable, and that in some cases they are absolutely required so to do. In many cases of a general nature, or prevailing usage, the Judges may be able to decide the point of themselves: in others, which may depend upon particular facts and circumstances, the assistance of a Jury may be requisite; and wherever such assistance is required, there are ready modes of obtaining it. I will mention one instance in which Courts of Law are required by the legislature to discover and decide, if the point be litigated, a question upon the reasonable execution of the power. By the General Inclosure Act (41 Geo. III. U. K. c. 109. s. 38.) a rector or vicar is enabled to lease his allotment, under certain restrictions, mentioned in the act, and amongst others, "So that there be inserted in the lease, power of re-entry on non-payment of the rent or rents to be thereby reserved within a reasonable time, to be therein limited, after the same shall become due." A lease of such an allotment, must therefore provide, that if the rent

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be unpaid for some specified number of days or weeks after the day of reservation, the rector or vicar may re-enter; and if any question should arise, whether the number of days specified in a particular lease be, or be not a reasonable time, the Courts of Law must necessarily find some mode of deciding the question.

For these reasons, my Lords, I am of opinion, that the words of the clause in question may, and ought to be understood to mean a reasonable power of re-entry: and taking this to be the legitimate meaning of the words, I proceed to shew, that, in my opinion, the power of re-entry, contained in the particular instance of the lease in question, is a reasonable power.

Usage is of great weight in considering what is reasonable; and it cannot be denied, that the power of re-entry, as expressed in this lease, is, in form and substance, such as was frequently found in leases before the execution of the settlement by *Louisa Barbara Mansel*, which was in 1757. This is a fact that must have been in the knowledge of some of your Lordships, without recurring to the special verdict for information as to the leases of this particular estate. If any space of time could be allowed beyond the days of payment prescribed in the reservation, the space of fifteen days, which is the period allowed in the present lease, will not, I am persuaded, be thought an unreasonable space of time. Indeed, although this objection was pointed out,  
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it was not so much insisted upon at your Lordships' bar; nor could it be in the construction of a settlement allowing twenty-eight days for payment, in leases, to be made at a rack-rent. The main stress of the argument was applied to that part of the clause in the lease, which narrows the power of re-entry, to cases wherein no sufficient distress can or may be had and taken upon the premises, whereby the rents and services, and all arrearages thereof, may be fully raised, levied, and paid.

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Upon this part of the argument, the case of *Coxe v. Day* (a), was quoted and relied upon. It has, however, been discovered, that the decision in that case is contrary to a prior decision of the Court of *King's Bench*, in a case of *Hotley v. Scot*, reported in *Lofft*. 316, and of which a more correct MS. note was also cited. This earlier case was certainly unknown to the counsel by whom *Coxe v. Day* was argued, and probably to the Court also; so that the decision in *Coxe v. Day* is not wholly free from question as to its own particular circumstances. It was certainly not thought applicable to the present case by the two surviving Judges of the Court when the present case was before them; and it is distinguishable from this by the difference of the language of the clause upon which it arose; for in that case, the words of the clause were not general, as in the present,—“a power of re-entry

(a) 13 East 118.

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for non-payment of the rent," but special—"a power of re-entry, if the rent be behind for the space of twenty-one days;" which words do not so easily admit the introduction of any other qualification or matter as the general words of the present clause. So that, upon the whole, the case of *Coxe v. Day* does not appear to contain a decision precisely in point to the present case, and therefore, in respect of authority, the question still appears to be left open, whether, in the absence of any words denoting a contrary intention in the mind of the framer of the clause, a restriction of the right or power of re-entry to the absence of a sufficient distress, be a reasonable restriction in a lease like the present; for if it be, then a right or power so restrained is a reasonable right or power of re-entry; and the introduction of such a right or power into the present lease is a good execution of the leasing power contained in the settlement.

Such a restriction of the right had prevailed in practice before the execution of this settlement in 1757. It was known and in use, though probably less general or frequent, before the passing of the statute 4 *Geo. II.* c. 28, in 1731. If the effect of that statute be, as at least one very learned person has thought, to alter entirely the common law, and to take away the right of re-entry, under any circumstances of demand and refusal of the rent, where a sufficient distress can be found—then certainly the express introduction of the words of restriction cannot invalidate the

the lease, because it is only an expression of a matter tacitly contained and implied by operation of law. But supposing the statute not to have this effect, still, in my opinion, the restriction is reasonable in itself, in a case like the present. The instances of proceeding at the common law, by demand of the rent, since the statute was passed, are very few — the proceeding is in itself troublesome and difficult, as will appear by the circumstances required, which I have already mentioned. It was indeed so troublesome and difficult, and found to be attended with so little benefit to landlords, that the statute was passed for their relief, substituting the absence of distress in the place of demand. Can it then be said, that the reversioner is unreasonably restrained, or prejudiced, by the introduction of a matter which the legislature has thought generally beneficial to landlords, and which, in all probability, he himself would have adopted, even if the terms of the lease had been such as to have allowed him to act otherwise? I say, that in all probability he would have adopted it, because I presume his only wish, like that of every other reasonable person, must be to obtain the payment of his rent in the most easy and speedy manner, and whatever difficulty there may be in viewing a messuage or farm, so as to ascertain whether sufficient be found upon it to answer the arrears of a rent, bearing, as in this case, a very small proportion to the annual value of the tenement; still I have the authority of the legislature, and of the experience upon which the statute was founded, for saying, that this difficulty is less in practice

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practice than the difficulty of making such a demand as would authorize a re-entry at the common law. If any thing more be desired by the reversioner than a speedy and easy mode of securing and enforcing the payment of the reserved rent, I should say that he desires more than the framer of the settlement intended to give, and more than the law ought reasonably to allow. The power of re-entry, in whatever words it be expressed, can be exercised only in one of two modes, that is, either by making a demand at the common law, without regarding the value of the distrainable goods on the premises, or by ascertaining that no sufficient goods are to be found on the premises, without regarding a demand of payment. For the reasons already given, I think the latter must be considered as the most effectual and beneficial mode, and therefore, speaking generally of cases of this nature, I can discover no reason for resorting to the former, except a hope (certainly not entertained in this particular case) that the tenant being taken by surprise, and not expecting a demand, may not be prepared for immediate payment in money, and a desire to take advantage of his want of preparation, and deprive him of the residue of his term, or harass him with a law-suit. To such a motive a Court of Law will never lend its aid, and a construction calculated to give effect to such a motive would be contrary to the general principles of the law: and it ought not to be omitted, that the present question arises upon the construction of that part of a leasing power which is intended to create a forfeiture of the lease executed under the

the power. It is said in our books, that forfeitures are odious in the law; and this is the reason assigned for requiring so much formality and precision in the demand of the rent at the common law. And for the same reason, in addition to all the others with which I have troubled your Lordships, I think such a construction ought to be put upon the words of the settlement as will tend rather to the exclusion than to the introduction of forfeitures of the leases to be granted under it. For these reasons, I am of opinion, that the demise of the 5th of *September*, 1803, is not invalid.

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The LORD CHANCELLOR.—This question is, in every point of view, undoubtedly, in all its bearings and consequences, one of the greatest importance. It is of very considerable importance to the immediate parties, and to others whose rights depend on the result of your Lordships' determination of this cause, whether your Lordships shall pronounce the lease in question to be valid, or invalid. The establishment of the invalidity of this lease would, it has been said, give rise to many other questions of a similar nature; and therefore not only is every tenant who holds under a lease founded on a similar title deeply interested in your Lordships' decision, but the consequences are not confined to their interests only—as the lessees under such demises, which are said to be very general, if these leases should be held to be not valid, would severally have a right to recover an equivalent over, against the assets of the original lessors, as was the case
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of the *Queensberry* leases. Beyond those considerations, the public interest also demands your Lordships' peculiar care, as that interest is materially involved in the result of this case, which is to furnish a principle for future determinations, and which renders it of the utmost consequence that it should be rightly decided. If, therefore, I could expect that I might be brought to change the opinion which I have long entertained on this question, or be enabled, consistently with the time and attention required by my other important duties, to throw my sentiments into a more formal shape, and better arrangement, I should be desirous of taking further time for delivering my more deliberate opinion at a future day, when my judgment should have been more matured by the fullest consideration.

Differing as I do, and which gives me much pain, from many of those for whose talents and learning I have every reason to entertain the highest esteem, I am inclined, in so doing, to treat their opinions with profound respect. Otherwise, I must confess that the course and habits of my professional life have so disposed my mind to consider such questions as those now before your Lordships, that it gave me at first very much surprise to find that on some of these questions there should have existed any doubt or difference of opinion.

As to the authorities which have been cited, as applicable to this case, we have been referred to the case of *Hotley v. Scot*, and the conflicting decision of *Coxe v. Day*, besides the negative
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authority of the case in *Willes*, who, I may observe here, was certainly a very great common lawyer: and I avail myself of the information respecting the two former cases which has fallen from the two learned Chief Justices, in the impression which I am to permit myself to receive from those determinations, with the further authority of two of the Judges of the Court below* who have before given their opinion on the point, in the judgment pronounced in this very case. But I cannot admit that all the authority which the subject-matter of this case is capable of has been brought forward. It has been soundly urged, that the practice of professional men, by whom the conveyances of the real property of the Kingdom have been devised and prepared for a long series of years, is a sufficient ground for supporting a doubtful proposition of law, and that but for the consequences of shaking title to property, the Judges of the Courts in *Westminster-Hall* have frequently declared, that if certain points depending on such established practice had been *res integra*, they would not have assented to the doctrine to which, in the particular cases, that practice had given the sanction of authority.

But Courts of Law should, as I think, go still further than they commonly do in considering questions of this nature. They should enquire of decisions in Courts of Equity; not for points founded on determinations merely equitable, but for legal judgments proceeding upon

* Lord *Ellenborough*, and Mr. Justice *Bayley*.

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legal grounds, such as those Courts of Equity have for a long series of years been in the daily habit of pronouncing as the foundation of their directions and decrees.

From the years 1772 to 1780, which I consider the most profitable period of my life, I spent the intermediate time in the office of a conveyancer, where I became acquainted with the practice and opinion of the most eminent men of that time; and I know that in those days, if it had been required, that a lease should be prepared under such a leasing power as this, given by a marriage settlement, it never would have occurred to any one who possessed any knowledge on such subjects, to have questioned, whether the introduction of a delay of fifteen days in the clause providing for the power of re-entry, would render the lease invalid for non-conformity with such a leasing power. And that I think may be fairly urged in considering what may be termed the unwritten authority applicable to this case. Such marriage settlements as these are often framed in very different ways. In some, the tenants for life are the persons to whom the power of making leases is wholly entrusted. But as one great object of giving that power is to ensure the due management and cultivation of the estate, it is often in well drawn settlements given to the trustees to preserve contingent remainders to provide against such cases as these, where the father and mother die, and leases are necessary to be made for the advantage of the estate; and therefore the inheritance and legal estate is often given
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to trustees for the purpose of making leases during the infancy of the *cestuis que use*, and then the trustees to preserve contingent remainders; or the trustees of the inheritance, having no interest, are empowered to make such leases. Now the form and usage of practice, as it regards such leases so made by the trustees, must necessarily have very considerable weight in determining the conditions on which such leases should be granted. In the majority of such settlements, no mention is made of any period to be given to the tenant for the payment of the rents; and yet in almost all the leases under such powers, a certain number of days is given. Many leases under such powers too, are made under the authority and sanction of the Court of Chancery, and of such leases, I will say, in vindication of those who have been my predecessors, and of those who may be my successors, although not for myself, that in all cases of leases directed to be made by the Chancellor, the form in which they have been directed to be made, is an authority of law, for saying that they have been made in due execution of the several powers; for he is the competent authority to say whether they are drawn according to the powers. He is a Judge both of Law and of Equity, and invested as he is with competent authority, it is his opinion which must decide whether such leases are made according to the legal construction of the language of the power, and its legal effect. Can then recourse be had to a better source in judging of a question of this nature, than the practice and the decrees of the Court of Chancery?

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Let me suppose that, in the present case, the Chancellor was called upon in his judicial character by these parties having contracted for a lease to be made by virtue of this leasing power, and the person claiming to have the lease had instituted a suit for specific performance of such a contract; and suppose the Chancellor should decree a lease to be made, he would in pursuance of the established practice of his predecessors, direct the lease to be made with a power of re-entry, worded as this clause is, giving the tenant an extension of the time, within which he must pay the rent. It would be his province to determine ultimately whether the extension of time so given was reasonable, and whether in all respects the lease so directed to be executed were within the terms of the power. And here I venture to say, that in all the cases of that nature which have come before my predecessors, their decisions are as much entitled to be considered as of authority, nay, even more so, than any others which come before your Lordships.

My Lords, now that I am on the subject of authority, it may be proper to observe here, that there are certain cases wherein the legislature has adverted to reasonable time, as being a well known subject-matter of legal recognition. Upon the division of commonable lands under inclosure acts, there are always amongst those who have claims, a class of persons entitled to considerable allotments, in which they have only estates for life. I mean Parsons and Vicars. A Parson or Vicar is authorized

riized by the General Inclosure Act *, to make leases of their allotments for any term, not exceeding twenty-one years; but it is provided, that in such leases there must be a power of re-entry within a reasonable time. That has been acted upon ever since the statute passed, and in such leases it has always been the universal practice, to give the tenant a certain number of days, just in the same way as it has been done in the present instance. Now let me ask what difficulty can Courts of Justice have in deciding what shall be considered a reasonable time, when the Legislature has so expressly recognized it as a well known incident to such leases? I must say, that in my opinion it would be most unreasonable to say, that Courts should hold that fourteen or fifteen days given to a tenant for the payment of his rent before his lease should be forfeited would be reasonable in the case of a lease made by a rector or vicar under this inclosure act; but unreasonable in one made by a tenant for life under such a power as this in an ordinary settlement, (the form of which has been adopted, and transferred into this clause in the act, to enable the person to demise the allotment) and a direct breach of the terms of the power contained in that settlement.

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* 41 Geo. 3. (U. K.) c. 109. s. 38. The words of the act are, " So as there be contained in every such lease, POWER " of re-entry ON non-payment of the rent or rents thereby " to be reserved, *within a reasonable time*, to be therein " limited, *after the same shall become due.*"

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In this case, independently of the practice having been always founded on the principle that such a power of leasing as this is admits of the superadding these legal and reasonable conditions to the right of re-entry, a contrary decision proceeding from your Lordships, would be one of the most mischievous in its effects that ever was pronounced. Taking it that this special verdict contains every thing which ought for the purpose of this question to be found, I see nothing in the case which requires such a decision.

An argument has arisen which has been much pressed at the Bar, on the admission of what is called extrinsic evidence. But in this case I think that extrinsic evidence admitted was not only admissible, but necessary and unavoidable, for you could not come to a proper conclusion through the medium of what is contained within the four corners of this instrument only, or without having recourse to other instruments. You are referred to them by the deed itself, and you must necessarily resort to them for obtaining the meaning of the power. In this case there were existing leases in the year 1757, the time when the settlement was made, and that instrument not only refers to those leases, but it does so in the very part wherein the leasing power is given. They must therefore necessarily be referred to, and in all their parts, in order to understand the object of the creator of the power, before it can be known in what manner it should be executed, so as to be conformable with her view and intention. I do
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not mean to say that we should go beyond that, to leases which had been made of the property before that time, or look further than to the leases then in existence, in order to become acquainted with the state of the property at that period; but we are directed to resort to them for that purpose: and if they shew that a system of leasing adapted to the then state of the property was pursued, it is impossible to shut our eyes to that evidence, proving, as it does, that the power was intended to be accommodated to the then state of the property.

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Having made these general observations, I must now call your Lordships attention to the facts of the case. [Having very summarily stated them), and being about to read the words of the first leasing power, his Lordship adverted to the statute (a) empowering the committees of lunatic tenants for life, to execute powers of granting leases for lives under the direction and order of the Chancellor, as an additional head of authority, on the point of the admissibility of reasonable qualification of the power of re-entry.]

Under that statute (continued his Lordship), I never had any doubt in directing a committee to make leases, that he might qualify the ordinary reservation of a power of re-entry for non-payment of the rent, inserting a restriction as to that

(a) 47 Geo. III. ch. 75. ss. 3. & 4.

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power that until the rent should be arrear for fourteen or fifteen days, the estate should not be forfeited. So if a parson or vicar, having an allotment under an inclosure act; had become lunatic, the Court would have acted in the same way as to the leases of their allotment: and but for the opinion which I understand had been delivered in the *Exchequer Chamber*, in this case I should never have had any doubt about the propriety of it.

It is very material to consider, in construing this power in a marriage settlement, that it is a contract which all the parties to it have entered into with each other; and when we come to settle questions which arise between the temporary landlord and the tenant, on the construction of leases granted under the power, we must consider the landlord as having acted *bond fide* on the behalf of *all* the parties interested in the inheritance under the original deed, and they are not to be encouraged by Courts in being astute to find out matter of forfeiture, or to be suffered to defeat the leases by mere matter of misconception, if, upon a fair construction, they may be supported. Then we must not overlook that a considerable fine has been paid in consideration of the lease in question, and that is, in fact, a payment of rent. It is a render of so much rent in advance, and at once, instead of a future succession of payments from time to time, and the small annual rents and other services reserved, are comparatively of very little value.

[His

[His Lordship then stated the terms of the other leasing powers, commenting on the distinctions, so often already observed on, in prescribing the several modes of leasing applicable to the different property which was to be the subject-matter of the demises in the contemplation of the settlor, and particularly noticing the reference to the ancient and accustomed rents, duties, and services in the power to lease for lives, and to the usual covenants usually inserted in leases of the like nature in the power to let for mining, and the omission of any reference in the power to lease for short terms absolute.]

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Now, unless (said his Lordship) the conveyancers of modern times are much abler than those of the last century, and have some mode of dispensing with what was formerly considered indispensable, they must necessarily be obliged to look into the *existing* leases in the first case, and into such as are *usual* in the last, to all of which the deed has in one part or another referred them, in order to prepare the leases in such a form as the settlor has required, to be observed by the persons who were to frame them. There is another very important requisition in the first leasing power, to which it is very material that I should direct your Lordships' attention. It requires that there be reserved during the continuance of the estate demised, *as great* OR BENEFICIAL rents, duties, and services, or more, as now are or at the time of demising the premises &c. to be demised, were reserved or made payable in

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respect thereof. If therefore an existing lease in 1757 were produced, and I do not carry it further than that period, it is impossible to say, that under this power regard is not to be had to that lease: in construing the object of the power according to the intention of the creator of it, you are bound to receive in evidence that to which the power so expressly refers. Can any thing be stronger than those words, not only are there to be reserved the ancient and accustomed rents &c. or more, but as great *or beneficial* rents, duties, and services, or more, as now are or at the time of demising the premises so to be demised were reserved?" I am entitled to advise your Lordships that this word "or" should be understood, as if it were "and" in this case; and in the next leasing power we find the words used are as great *and* beneficial rents, which I consider gives to the word *beneficial* a signification of great importance, when read with a view to collect the intention of the framer of the instrument as to the execution of this power, and under a deed so referring to existing leases, and in such terms. I have great doubt if this proviso in the lease had not been framed just as it is, whether for that reason the lease would not have been bad; for it is not, as has been truly said, so much the quantum of the rent as the principle of the reservation of it, to which regard must be had by your Lordships in determining questions of this nature: the word more relates to the amount beneficial to all the other incidents of the reservation of the rent, and particularly to the security for

for the payment, and it is only required to be as beneficial as the existing reservations were. Now if the same rent be reserved *in the same manner*, is it not as beneficially reserved? The same rent may be reserved in a different manner, and not as beneficial to the inheritance. By the words following "And so as," occurring in that part of the settlement, where the best and most improved yearly rent that can be obtained, is required to be reserved from half-year to half-year *de anno in annum*, the creator of the power expressly says, that for non-payment of that rent there shall be no re-entry till the tenant shall have been allowed twenty-eight days after for the payment of it. In the terms of the first power certainly there is no mention made of any time within which, beyond the day of the reservation of rent, the arrear may be paid. But is not a power to re-enter, if the rent shall be unpaid for the space of fifteen days, a power of re-entry reserved: and is it not reserved for non-payment of the rent? It is not an absolute power, but it is *a* power; and where are there any words in that part of the deed which direct that it shall be an unconditional power. There is no such thing expressed in this part of the instrument, although in a future part we find it expressly directed to be reserved conditionally.

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 Earl JERMY.

Previous to the agitation of this question (such is the consequence of what my professional habits have been, as I have before said) it would have very much astonished me to have been told, that

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the superadding these two qualifications to a proviso for re-entry reserved in a lease under this general power, would have the effect of rendering the instrument invalid: and if sitting elsewhere I had been called on to decide, that the tenant, filing a bill for a specific performance of a contract for a lease, under this power, could have no other than such a one as should contain a peremptory clause for re-entry, in case the rent should not be paid on the day appointed, I should have held it contrary to all the principles of law to turn him out of Court for refusing to accept or execute a lease with such a proviso. I see no sort of reason why there should be any difference made in leases at rack rent, and those for which an equivalent consideration has been paid; in the first instance, by way of fine, provided it be *as beneficially* reserved, which alone would be sufficient to make it a good execution of the leasing power.

What I have hitherto said on the condition of the delay of fifteen days certainly does not touch the other alternative of there being no sufficient distress on the premises; unless your Lordships should be of opinion that the power of re-entry directed to be contained in the lease, must be taken to mean a reasonable power: and—if (it having been the constant and uniform course in the practice of conveyancing, as sanctioned by the Courts, to apply that quality to such a condition, and accordingly to insert it in every lease) it must
now

now be deemed in law to be a reasonable condition—in that case the observations I have already made will so far apply to this second objection. The term *reasonable* is not applicable certainly to the *quantity* of the rent to be reserved, but is wholly restricted to the beneficial reservation of that rent, be it what it may, as it affects the security of payment whenever the rent should become due.

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[Lessee of
Earl JERSEY.]

Although I do not agree to the extent of the proposition laid down by a very learned Judge who, I think, is as old in the law as myself, I mean my Brother *Wood*, who has stated it as his opinion, that the statute of the 4th *Geo. II.*, is imperative on landlords as to their adopting, in all cases, the remedy there furnished; yet upon the construction of that statute, and of the General Inclosure Act, to which I have alluded, it is sufficient for the present purpose to observe, that they furnish abundant authority for holding that the insertion of such a condition in a clause for re-entry is warranted as being reasonable, and that its introduction therefore may be considered as no objection to a power of re-entry so qualified, but that it may notwithstanding be deemed to be a good execution of this leasing power.

Having already drawn your Lordships' attention to the extreme importance of the general effect which the decision of this case will have upon the whole class of tenants holding property under this sort of tenure, and whose leases are for

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for the most part, if not universally, founded on titles and framed in words which will render them liable to these same objections, I wish it to be understood, that it is not now to be considered by your Lordships in deciding this question, whether leases of this nature are more beneficial either to the remainder-man, or the tenant for life, for that is not the principle on which this case should be decided.

The true question is, whether the reservation of rent be provided for by the covenant in this lease in the way most beneficial to the whole inheritance, and all the persons who may be thereafter interested. In pursuing that enquiry, and indeed in the whole administration of the law, nothing is more important than to consider what has always been the approved practice in such cases, and what rules that practice has introduced; for to those it must always be the safest course to adhere. If once you depart from that course, it must be taken into consideration that no tenant for life, nor trustee, can or will hereafter act in the execution of a power without the previous sanction of a court, which can only be obtained through the dilatory and expensive medium of a litigated suit. I shall only observe in conclusion, as Mr. Justice *Bayley* has put this question. There is a power of re-entry for non-payment of rent contained in this lease, and such powers are divers as is acknowledged in the books.—It is a reasonable power, having the usual legal conditions: and if, on the one hand it be said that those,

those conditions are not expressly required by the leasing power given by the settlement, it may be answered on the other hand, that they are such as there is nothing to be found there which condemns.—You have moreover the authority of the Legislature for holding them to be reasonable, at least: and therefore I say that the lease appears to me to be a good execution of the power, and if so, it should be pronounced to be valid. That is the opinion which it is my duty to submit to your Lordships; but it is not for me to anticipate whether your Lordships will adopt it in the judgment which you may pronounce.

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 "Doe,  
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Lord REDESDALE delivered his opinion nearly as follows:—Having in the earlier part of my life had much intercourse with persons eminent in the practice of conveyancing, which furnished me with opportunities of information on cases of this description, I shall therefore offer such reasons as occur to me for holding the opinion which I have formed on this question. On the subject of the practice of conveyancers having weight in determining points of this nature so high has the authority of ancient and uniform practice ever been considered, that even the construction of an act of Parliament has been adopted from, and founded on the practice of lawyers conversant with the principles of common assurances: and that principle was sanctioned and adopted by this House in the case of the *Earl of Buckinghamshire v. Drury* (a). If your Lordships should

(a) 2 Eden's Rep. Temp. Lord Northington, 64, and Bro. P. C. 492.

decide

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decide that regard is not to be had to long established forms and practice in considering questions of this nature, by such a decision every man's title to his property would be endangered.

But more especially is it necessary that the established practice should be adverted to in aid of the construction of instruments of this description, framed from precedents constantly acted upon, and never disputed in Courts of Law. How else are we to understand such instruments, if not by giving the technical effect to the words employed by the parties to them, which are in truth the words of the professional persons who advise them, and are used as being best calculated to carry into execution the intentions of the party who instructs them, who are of course informed of their meaning and legal import? Therefore it is that I hold that we are to be bound by the practice of conveyancers, which, on subjects of this sort, is so important as to be tantamount to a practical exposition of the law, as it affects such subjects: and most mischievous would be the consequence if it were not so, and if titles should be made to depend on verbal criticism, and be impeachable by means of the literal construction of the instruments which create them. If that be so, the facts of this case, and the words themselves of the power and of the proviso, must decide this question when applied, as they ought in all cases to be, to the subject-matter. The three powers relate to three distinct descriptions of the property, (stating them). That distinction must convince us that the person who framed this settlement,

ment, contemplated the different circumstances in which the three descriptions of property then were; and that she meant to give by the several powers the same degree of enjoyment of each as had been given of the same property before, which as to that which is the subject-matter of the present question, was, that the tenant for life should have the advantage arising from renewals of the existing leases, from time to time, as the lives should drop during his possession. She has required only that he should reserve as great or beneficial rents, &c. or more (and not less) than had been reserved in the former leases; and not only the rents, but every other service was to be reserved in exactly the same manner as in the prior leases. The power to lease the second description of property, requires the best and most improved rents to be reserved, and then are added, the words "that can be *reasonably* had or obtained for the same." If that word *reasonably*, which is introduced there merely out of caution, had not been added, would it not have been implied? and if that word had been absent, and a lease had been made reserving, in reasonable estimation, the most improved rent that could fairly, honestly, and reasonably be obtained without fine or premium, would not that have been a good lease? That word, therefore, being introduced, does not in any respect alter the terms of the power; for it must have been so construed without it. Of the two powers to lease for lives or years determinable on lives, and for short terms at rack rent, one requires the power of re-entry to be reserved in

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1818. one way, the other in another; and I think that
 1821. was designedly so varied. With respect to the
Sherwin latter, the power of re-entry is to be given for
v. non-payment of the rent within twenty-eight
[Lessee of days after it has become due, pointing out the
Earl Jersey.] time in precise words. Why then were not pre-
 cise words used in the other power? For this obvi-
 ous and manifest reason: because the first power
 referred to the mode of executing the power
 which had been observed in the prior and existing
 leases, and it was intended that whatever might
 have been the mode, should still continue to be
 followed; or if there should be found to be no
 such power of re-entry for non-payment of the rent
 reserved there, then that *some* such power was to
 be inserted in the new leases. It is a mistake to
 say that the words of the power in the deed are
 precise and specific in their directions. That is
 the fallacy on which much of the reasoning has
 been founded to shew that this lease is invalid.
 The words are not precise—they are vague and
 loose, amounting to nothing more than a mere
 note or memorandum, importing, that in case
 there should be no power of re-entry for non-
 payment of the rent inserted in the former de-
 mises, such a power should be introduced in the
 new leases, which were however still in all other
 respects to be conformable to the old ones. In the
 former leases there was a power of re-entry re-
 served not only for non-payment of the rent, but
 for the non-performance of the other services,
 such as the render of capons, and doing suit of
 mill, &c. to all of which the power extended.

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The power in the settlement, therefore, being quite general, without giving any definite directions as to the mode of executing it—being in short merely in the nature of a memorandum, if I may so call it, that the leases should contain a power of re-entry, the maker of this lease has put the natural construction upon the words: and the construction which is attempted to be put upon them, in support of these objections, is a forced construction, and an attempt to render them more precise and strict than they really are.

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Now let us suppose that a contract had been entered into between the parties to this lease for a lease of the property in question, and it had been agreed that it should contain a power of re-entry for the non-payment of the rent to be reserved. If on a suit for specific performance of that contract a Court of Equity should decree it to be specifically performed, would the Court ever have thought, that under the terms of this clause in the settlement, they were bound to direct a clause to be inserted in the lease, giving an absolute power of re-entry on non-payment of the rent, unqualified by the ordinary provisions of a few days' extension of the time and the absence of a sufficient distress? Would not the words be construed according to the common and ordinary practice which must have been borne in mind by the conveyancer, who prepared the settlement, when he inserted this general clause for reserving a power of re-entry? The professional character and habits of the person who framed the deed must be regarded,

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Dor,

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ed, and the technical acceptance of the clause, according to the common notions of such persons really must be resorted to, in order to ascertain the intention of the parties to the instrument, who are made to express themselves in his more accurate language. Having then recourse to such means of construction, we must see that this clause was no more than a mere minute or memorandum, the terms of which were to be supplied more definitely in the lease, as it must have been if it had been made one of the terms of a contract for a lease entered into between these parties. I consider, therefore, that it must be taken to have been the intention of the parties to the instrument, that the terms of this clause should be advisedly not precise, thereby designedly leaving it to be interpreted by the clause to that effect in the former leases, if they contained such a clause, but if they did not, that a reasonable power of re-entry should be inserted in the future leases. If there were a power of re-entry reserved in the former leases, no especial directions, as to the insertion of such a power in the new leases would be necessary, because the rent being required to be reserved in *as beneficial* a manner, it must have been reserved in the same words and in none other. Now, as all the doubt in this case has been founded upon the construction of the words of the instrument, and they were clearly not intended to express precisely and positively how what was required to be done should be done, that doubt may be best removed by ascertaining what a Court of Equity would have

have ordered to be done on a question brought before them by a suit for specific performance of a contract for a lease entered into in such loose terms as these; and there can be no doubt that a Court of Equity would, in decreeing the execution of a lease, have directed that it should contain a power of re-entry in all respects similar to that which is contained in the proviso in this lease, construing this loose clause precisely as it has been construed by the maker of the lease in question. So, I apprehend, would a Court of Law also have construed such a contract, if a question on the terms of such a power had been agitated before them. They would enquire in what manner a Court of Equity would have directed such a lease to have been drawn, and what form of lease was in received use amongst conveyancers of established character in business in such cases, and they would decide accordingly.

Upon the whole, therefore, it does seem to me that the lease now under your Lordships' consideration is valid; because, as it has been found by the special verdict, it was made in conformity with the former leases: and I consider the references in the deed to those former leases, as having the effect of requiring the new leases to be made, and construed by reference to the contents of those former leases; and that they were properly taken by the tenant for life, as a guide to assist him in framing the instruments in the first instance; and if any question should after-

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wards arise as to its being a good execution of the power, I think the most effectual means of determining it is by investigation of the former leases, which have been admitted in evidence. If, on inspection of those leases, there should be found a similar power of re-entry reserved, or if no such clause should be found there, the power in the new lease be reasonable and adequate, that would be sufficient to enable your Lordships to decide, that the new lease so framed, was a good execution of the power to lease, the words of which ought not to be construed as meaning a precise and positive power of re-entry, as it has been contended it does, but a reasonable and ordinary power.

Therefore, upon the particular words of the clause in the deed and settlement, and not on any general view of this case, I think that the lease in question ought to be supported, and that the judgment of the Court of *Exchequer Chamber* ought to be reversed, and the judgment of the Court of *King's Bench* affirmed.

On the motion of the Lord Chancellor the House at once ordered the judgment of the Court of EXCHEQUER CHAMBER to be

• REVERSED:

And the original judgment of the Court of KING'S BENCH to be

AFFIRMED.

1819.

WEAK, on the dem. of BURGE v. CALLAWAY  
and others.

Saturday,  
15th May.

SIR *William Owen* now shewed cause against a rule which had been obtained by *West* (3d May) for judgment as in case of a nonsuit for not proceeding to trial, issue having been joined in *Hilary* Term, on an affidavit of the solicitor for the lessors of the plaintiff, stating that a serious domestic misfortune had prevented his attending the assizes, of which he had given notice to the defendant's solicitor, informing him at the same time that he had written to his own agent to countermand the notice of trial, and had apprized the sheriff, that he might not summon a Jury; and the affidavit of the agent stated that he had, on the 24th *March*, given notice of countermand, accompanied by an undertaking peremptorily to proceed at the next Assizes.

Rule for judgment as in case of a nonsuit, for not proceeding to trial after issue joined (obtained in the next Term, as it may be in *this Court*), and notice of trial given and countermanded, the plaintiff's attorney voluntarily (although too late, if it had been an ordinary case), giving a peremptory undertaking to proceed at the next Assizes—discharged, and without costs, on its being shewn as cause that a serious domestic misfortune had prevented the plaintiff's solicitor from proceeding to trial.

Under these circumstances it was prayed that the rule might be discharged (the plaintiff being already under a peremptory undertaking given in the notice of countermand) *without costs*, on the ground that the countermand, founded on such a reason, and accompanied with a peremptory undertaking, was sufficient; and that in such a case the application ought not to have been made, at least the costs should be ordered to abide the event.

The voluntary undertaking so given, however, must be afterwards made a rule of Court.

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and others.

*West*, in support of the rule, submitted, that the defendants were entitled in *this Court* to move for judgment as in case of a nonsuit for not proceeding to trial in the next Term after issue joined; and that at all events he urged the defendants would be entitled to costs by the rule of the Court. The peremptory undertaking being merely voluntary, he insisted was altogether insufficient.

In reply it was observed, that although the practice in this Court differed in respect of the time for applying for judgment as in case of a nonsuit, and for the costs; yet particular circumstances would always be considered by the Court, and in this case, where the object of the application was the obtaining costs (which appeared from the defendants having moved for them on the 1st instant) sufficient reason had been given for relaxing the rule.

The Court expressed disapprobation of the application under the circumstances, and observed, that it had been rightly said that they would not insist on a general rule of practice in a matter of this sort, where particular circumstances justified a departure from it.

As to the undertaking given, the Court (although they intimated that the plaintiff's attorney might have been attached upon it) considered that it ought to be repeated, in order to be made a rule of Court—and on those terms, they

Discharged the rule, *without Costs*.

1819.

## The ATTORNEY GENERAL v. KENT.

Tuesday,  
18th May.

ONE of the counts in this information was framed on the 4th section of the 56 Geo. III. ch. 110. s. 4. to recover from the defendant, who was a *sumack* tanner, the penalty of 200*l.* for removing and concealing hides from the view of the officer. A verdict having been found for the Crown,

The statute 56 Geo. III. ch. 110. is general, and extends to all tanners, whether using bark or *sumack*; and the penalty imposed on the removing and concealing any hides or skins from the view of the officer, is cumulative on the penalty imposed by the 9th of Anne, ch. 11. s. 17.

*Jervis* moved that the judgment might be entered for the defendant, on the ground that he was not within that statute, which he contended applied wholly to tanners in bark, and that the 9th Anne, ch. 11, only applied to shomack tanners.

The Court, having granted a rule, the *Lord Chief Baron* reported the evidence, observing, that the fact of concealment had been proved beyond doubt, and therefore the only question would be, the amount of the penalties.

The *Attorney General*, *Clarke*, and *Walton*, now shewed cause, and

*Jervis* and the *Common Serjeant* endeavoured to support the rule.

For the defendant it was contended, that the 56th of Geo. III. having repealed expressly *only*

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 The  
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the provision of the 9th of *Anne* (sect. 12.) respecting the shaving of any hide or calve skin before they should be thoroughly tanned, leaving the 16th and 17th sections unrepealed, it had, by the 4th section not imposed a cumulative penalty on the *sumack* tanner who was not included under the general name of "tanner," by which the bark tanner only was meant, and so in a penal statute it should be considered. That proposition was attempted to be supported by a critical comparative examination of the terms of the two acts of Parliament.

For the Crown it was contended, that the two acts were in *pari materia*, and that the latter penalty was cumulative, and it was urged, that the act was of the 56th *Geo.* III. general in its terms, including under the denomination of "tanners," all the trade of every description.

The Court held, that the latter act was general, and applied to all tanners of every description, and they adverted to the language of the statute, to shew that it was so. They observed that it would go to repeal the 56th *Geo.* III. in great measure, if they should hold that it did not apply to any other than the bark tanner — that the 9th of *Anne*, ch. 11. was general beyond all doubt, expressly including the shumack tanner, and that from the words and whole tenor of the 56 *Geo.* III. that also must be considered general, and therefore they discharged the rule.

Rule discharged.

BLORE

1819.

BLORE v. MOTTRAM.

Saturday,  
22d May.

SIR *William Owen* had obtained a rule, calling on the plaintiff to shew cause why the order made by Mr. Baron *Garrow* (that an order of Mr. Baron *Wood* for staying proceedings on the bail-bond assigned in this cause, on payment of costs, the defendant having put in bail and rendered, should stand on the terms of *the bail-bond standing as a security*), should not be rescinded.

Where an assignment of the bail-bond be taken after bail above have been put in, but not perfected, and the plaintiff's clerk in court has consented to an order for staying proceedings on the bail-bond, on payment of costs, he is not entitled to have the security of the bail-bond, because he has waived the right which arises from having lost a trial by his own conduct.

The facts on which this application was founded were, that the defendant residing in *Denbighshire*, was arrested on a writ of *quo minus*, returnable the 8th of *February*, 1819, and on that day a declaration was filed. On the 16th he put in bail before Mr. Baron *Wood*, at his house, and gave the plaintiff's clerk in court notice on the 17th. On the 23d of *February*, the plaintiff's clerk in court took an assignment of the bail-bond, and put it in suit. On the 2d of *April*, the defendant surrendered in discharge of his bail, of which the bail gave notice on the 5th. On the 28th a summons to stay proceedings on the bond was served, and was indorsed by the plaintiff's clerk in court, "Take an order, on payment on taxation;" and on the 30th an order was made accordingly by Mr. Baron *Wood*. The plaintiff's clerk in court, on the 4th of *May*, took out a summons for rescinding that order, which was ordered by Mr. Baron *Garrow* on the 6th.

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 BLORE  
 v.  
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*Jones, D. F.* now shewed cause, on an affidavit of the plaintiff's clerk in court, stating, that conceiving the plaintiff had, by the defendant's neglect, lost a trial at the last Assizes, and as the bail-bond had become forfeited, and ought to remain as a security for the debt, he did not pursue the order of the 30th of *April*, on which he had incautiously indorsed a consent, but obtained the order in question. He submitted, therefore, that as a trial had been lost, and the bond had become forfeited, the bail-bond ought to stand as a security, notwithstanding what had since taken place.

*Sir William Owen*, on the contrary, contended, that the plaintiff could not have gone to trial before, as the defendant had till the 1st day of *Easter Term* to perfect bail above, unless he would have waived exceptions to the bail; and his taking an assignment of the bail-bond shewed that he did not waive the exceptions. He also submitted, that another reason in this case why the bail-bond should not stand as a security was, that the assignment being after the bail had been put in, was irregular: and that the plaintiff had also waived the forfeiture of the bond by consenting to the order of the 30th of *April*.

The Court, under these circumstances, made the

Rule absolute.

HAYWARD

1819.

HAYWARD v. GREENWOOD and others and  
EXETER COLLEGE.

*Monday,  
21th May.*

**AN** injunction was granted, on the 27th of *February* last, in *Gray's Inn Hall*, to restrain the defendants from proceeding in an action of ejectment commenced against the plaintiff, to recover possession of a copyhold estate for lives, which had been sold to the defendant at a public auction.

The Court will grant an injunction to stay trial of an ejectment at the next Assizes, on a motion made on the 27th of *February*, of which notice had been given to the defendant's clerk in Court only on the 26th, if moved on merits confessed in an answer put in only on that day, because there is only one day of sitting in the *Hilary* vacation, which ought not to prejudice suitors, and it can be no surprise on a defendant under such circumstances.

The injunction had been obtained on a bill filed for a specific performance of the contract for the purchase, charging that the defendants had refused to perfect the plaintiff's title, by the College substituting the life of the defendant *Greenwood* for that of the plaintiff, and had brought an ejectment. The bill was filed on the 11th of *February*. The defendants appeared on the 12th, and put in their answer on the 26th. On that day (the 26th) the plaintiff gave the defendants notice (dated the 26th) that the Court would be moved on *Saturday* next, the 27th, for an injunction to restrain them from proceeding in the ejectment, on the merits confessed in their answer—and that in the event of the Court granting such injunction, that *the same might extend to stay the trial* of the ejectment at the *then next ensuing Assizes* for the county of *Oxford*.

Nor will they dissolve such an injunction before the hearing on an affidavit.

Such an application refused, with costs.



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*Beames* accordingly moved for the injunction on the 27th, previously apprising the Court, that it might be urged by the counsel for the defendants, that the notice of motion given for the 27th, being only one day's notice, would be an objection to granting it; but he submitted, that as the answer had been put in only on the 26th, the day on which the notice was given, and that as the Court sat on no other day than this, the shortness of the notice would not be considered an objection, in a case where the motion was made on the merits confessed in the defendants' answer, in which case there could be no surprise.


[Having mentioned that *Dauncey* and *Spence* held briefs for the defendants, the Court inquired if they were prepared to oppose the motion on the merits, and on their saying that they were not instructed to do so,]

The Court, adopting the reasons urged in support of the motion, observed, that the circumstance of their having only one day of sitting in the *Hilary* vacation, ought not to prejudice the suitors, by operating as an objection to granting a motion of this nature, under these circumstances; and they then granted the injunction.\*

\* *Ex relations, Mr. Beames, as to this point.*

*Taunton,*

*Taunton, W. E.* now moved to dissolve that injunction, upon an affidavit stating, that the plaintiff had not, since the injunction had been granted, applied to the defendants to settle the fine payable on the change of life, or to be admitted at a Court held since for the manor; and he submitted, that as the injunction had been granted *ex parte* for the purpose of enabling the tenant to apply to be admitted, his not having done so was good ground for now dissolving it.

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*Beames* opposed it, submitting that the Court could not thus try the merits of an injunction, on affidavits filed since it had been granted, to which

The Court assented, saying that they could not dissolve the injunction on such grounds, before the hearing. They therefore

Refused the motion, with Costs.\*

\* *Vide Blacoe v. Wilkinson*, 13 Ves. 454.

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Monday,  
24th May.

## BATE v. CARTWRIGHT.

Money deposited with a stakeholder, as a bet on the event of a foot race, may be recovered from him by either party, in an action for money had and received, after the race has been run, and the parties differ as to the winner.

A nonsuit, on the ground that such actions are an idle waste of the time, and hindrance of the business of Courts of Law, set aside.

<sup>14 M4W 729</sup>  
IN this action, which was for money had and received, to recover a sum of 10*l.* deposited in the hands of the defendant, as stakeholder of the sums betted, to abide the result of a wager of 5*l.* on a foot race, Mr. Baron *Garrow* nonsuited the plaintiff at the trial, holding that the wager was in itself of that nature which the Courts had, according to the current of authorities, endeavoured to discourage, by refusing to try such frivolous questions, arising out of the idle folly of parties, to the hindrance of the sober and necessary business of the other suitors.

*Jervis* obtained a rule to shew cause why that nonsuit should not be set aside, on the authority of the case of *Cotton v. Thurland* (a).

Mr. Baron *Garrow* reported the evidence, the substance of which was, that the plaintiff and another person had betted 5*l.* on the race, and had deposited the money in the hands of the defendant, and the race having been run, and the plaintiff having, as he stated, won the wager, sought by this action to recover the 10*l.*; but there being some doubt suggested to him as to his right to recover the whole, he afterwards insisted only on the sum of 5*l.* originally deposited by him.

(a) 5 T. R. 405.

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*Puller* and *Male* now endeavoured to support the nonsuit. They submitted, that a foot race was an illegal game within the statutes of 16 *Cha.* II. c. 7. and 9 *Anne*, c. 14. and that it had been determined to be so in *Lynall v. Longbotham*, (a) *Clayton v. Jennings*, (b) *Brown v. Berkeley*, (c) *Whaley v. Pajot*, (d) and *Ximenes v. Jaques*, (e) and they contended, that it was become an established principle in the Courts, that where a deposit of money was made for securing a bet on an illegal game, or any illegal consideration, they would not lend their aid to enable a party to recover it; and they cited *Howson v. Hancock*, (f) *Lowry v. Bourdieu*, (g) *Vandyck v. Hewitt*, (h) *Morck v. Abel*, (i) *Bowyer v. Bampton*, (k) and *Andree* and another *v. Fletcher* (l).

They finally urged, that this at least was the kind of claim which it had been considered that Judges should refuse to try, whether the wager was illegal or not; and they cited the case of *Eltham v. Kingsman* (m), as a strong authority on that point. In the present case, they stated the real question was, whether the plaintiff or another person was in fact the depositor; and one ground of the defence would have been, that the defendant had paid the money over to another person. A case was mentioned by *Puller*, *memoriter*, as

(a) 2 Wils. 36.

(b) 2 Bl. 706.

(c) Cowp. 281.

(d) 2 Bos. &amp; Pul. 51.

(e) 6 T. R. 499.

(f) 8 T. R. 575.

(g) Dougl. 468.

(h) 1 East, 96.

(i) 3 Bos. &amp; Pul. 35.

(k) 2 Str. 1155.

(l) 3 T. R. 266.

(m) 1 Barn. &amp; Ald. 683.

having

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having been recently brought on before Mr. Justice *Abbott*, at *Guildhall* (*Britton v. Davis*), where a similar question was raised, and his Lordship said, that he would not suffer the time of the Court to be squandered on such idle questions; but it being intimated, that the defendant could prove the payment of the money over to a third person, Mr. Justice *Abbott* then said, the cause might in that case proceed; but he added, that where a party was so foolish as to deposit money in such a way, he must get it again as he could, but that he had no means of recovering it at law.

*Jervis*, in support of the rule, submitted that the illegality of the wager \* had nothing to do with the merits of *this* action, for that according to the authority of *Cotton v. Thurland*, the plaintiff was still entitled to recover the sum deposited by him with *this* defendant; and on that point he also cited the case of *Farmer v. Russell* (a) and *Faikney v. Reynous*, (b) and the doctrine stated and authorities collected in *Selwyn's Nisi Prius* (c).

[*Wood, Baron*, observed, that where a plaintiff's right to bring an action was doubtful in law, he should consider that a Judge could not refuse to try it.]

*Cur. adv. vult.*

(a) 1 Bos. & Pul. 298. *Dis-sentientibus Rooke and Eyre*, JJ.

(b) 4 Bar. 2069.  
(c) Vol. i. tit. *Assumpsit*, Rules 7 & 8, and the notes.

\* *Quære*, Whether such a wager be illegal?

The *Lord Chief Baron* now delivered the opinion of the Court.—The question in this case is, whether the action lies. The last, and indeed the only decision that can be said to be in point, is that in *Cotton v. Thurland*, in 1793, and that, we think, determines this point. *Lord Kenyon*, in delivering his judgment on that occasion, distinguishes the case of an action brought against a *stakeholder* from that of a policy of insurance, where the risk has been run, and the party attempts to regain his money: and he put entirely out of the question the illegality of the subject-matter of the wager. The principal ground on which that case appears to have been determined was the fact of the money being still in the hands of the stakeholder and whilst it be, the depositor may recover it from him. The other Judges concur with him, *Mr. Justice Grose* changing his former opinion, and the Court over-rule the decision of *Mr. Justice Wilson*. We are bound by a case determined so solemnly; and although many cases have been cited, all of which we have looked into, we think that there are none that can sustain this nonsuit against the authority of that which I have particularly mentioned. We therefore make this

Rule absolute.

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## GAINSFORD v. BLACHFORD.

If a person who is asked by a tradesman respecting the circumstances and credit of another, tells him that he has been paid a debt due to himself from such person, and that he was ready to give him credit for any thing he wanted: that representation would not be sufficient to support an action for a deceitful misrepresentation of such person's circumstances, where by the tradesman was induced to give him credit, although such person had been before that time discharged under an insolvent act, and the defendant knew it, but did not mention it.

Such a colloquium will not support an innuendo that a defendant meant thereby, that such person was in good circumstances, and fit to be trusted generally with goods on credit.

THIS action having been tried again at the last Sittings before the *Lord Chief Baron*, and the Jury having again given a verdict for the plaintiff on the same evidence,

*Jervis* moved, in the early part of the Term, that the judgment might be arrested, on the ground, that the words laid in the declaration,\* as having been spoken by the defendant in answer to inquiries made by the plaintiff, respecting the circumstances of a third person, to whom the plaintiff was about to sell goods on credit, did not warrant the innuendo which the pleader had founded on them; and obtained a rule, against which

*Chitty* now shewed cause, submitting, that the innuendo was not too extensive; and that if it were, it did not vitiate the other allegations in the declaration.

He contended, that, with reference to an inquiry of another by a tradesman, of a customer's

\* The nature of the action, and the terms of the declaration, are fully stated in the case of the same name in the 6th Volume of these Reports, p. 36.

The Court arrested that judgment, after a second verdict given for the plaintiff, in such a case, upon a new trial granted on the same objections, viz. that the innuendo was not warranted by the words, and that the action could not be maintained unless it were.

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former's fitness to be trusted with goods on credit, an answer that *he* was ready to give him credit for any thing was amply sufficient to warrant the innuendo, that such person was fit to be trusted generally—that it was competent to a party to explain in his declaration, by an innuendo, what he considered to be the meaning of words addressed to him; and it would be for the Jury to say whether, under the circumstances in evidence, the innuendo was borne out. In the case of *Oldham v. Peake (a)*, the Court held, that the words “you are guilty of the *death*” of a particular person may be explained, by an innuendo, to mean the *murder* of that person, although the colloquium be only of the death. There the Court said, that the innuendo was not contradictory, but explanatory; not introductory of new matter, but ascertaining the meaning of the old. So it is here. That case was also a motion in arrest of judgment; and the Court added, “whether it was true or not, that such was the defendant's meaning, was a fact for the Jury to decide upon.”

[WOOD, *Baron*, observed, that he had seen declarations for words spoken ironically with an innuendo.]

The Jury have affirmed it, and it is now too late to object to it. In the case of *The King v. Aylett (b)*, the Court said, that the business of an innuendo was by reference to pre-

(a) 2 Bl. 969.

(b) 1 T. R. 63.



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ceding matter, to fix more precisely the meaning of it. That was all which had been done by this innuendo; and the suppression of the material fact, proved to be within the defendant's knowledge of the person inquired of having been recently discharged under an insolvent act, gave so much appearance of intentional fraud, or, at least, of misrepresentation to the transaction, as to justify the suspicion of a design to mislead, on which the innuendo was founded; and which would be sufficient to maintain the action by bringing it within the cases of *Eyre and another v. Dunsford*, (a) *Tapp and another v. Lee*, (b) and *Hutchinson v. Bell* (c).

He then submitted, that the answer of the defendant standing alone, and without the innuendo, would furnish sufficient ground for the present action; and in that case the innuendo might be rejected as surplusage, as had been held in *Roberts v. Camden* (d); and the unnecessarily proceeding further by inserting an innuendo in the declaration, instead of giving evidence to that effect, did not vitiate the count: *Taylor v. Eastwood* (e).

He also urged that this objection, being made after verdict upon a second trial, was cured by the verdict, and "not being against the right of the matter of the suit," is within the 16th and

(a) 1 East, 318.

(b) 3 Bos. &amp; Pul. 367.

(c) 1 Taunt. 558.

(d) 9 East, 93.

(e) 1 Ib. 212.

17th. *Cha.* II. ch. 8. for preventing arrests of judgment : citing *Stennel v. Hogg (a)* and *Richards v. Simonds (b)*.

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If, however, the Court should be of opinion, that the first count was bad for any defect in the innuendo, the verdict might still be maintained on the second count, which was free from that objection; and that in such a case the Court, if they thought proper, might award a *venire de novo*,\* which would be the regular course; but that it was not a ground for arresting the judgment; *Eddowes v. Hopkins (c)*.

[The Court suggested that there was not enough stated in the declaration; for that it should have been averred that the plaintiff had informed the defendant of his motive for making the inquiries respecting the person to whom the credit was to be given, and that he had been referred to him for that purpose, so as that it might appear that the defendant had been sufficiently warned to be on his guard; nothing of which had been done in this case: and Mr. Baron *Wood* observed, that he remembered the first case of the kind in which such an action had been brought, and where the Court, after much doubt, held, that it might be maintained, saying, that, although a person was not obliged to answer such a question, if he did, it must be answered truly.]

(a) 1 Wms.'s Saunders, 228,  
and the note.

(b) 2 Wils. 40.  
(c) Doug. 377.

\* Tidd's Practice, 928, 929.

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*Jervis*, in support of the rule, insisted, that any one count being bad, where the damages are general, would be fatal to the declaration; and the judgment must be arrested, for a *venire de novo* will not be awarded: citing *Holt v. Scholefield* (a); and in this case the evidence applies as well to the bad as to the good count.

As to the objection taken to the innuendo, that it enlarged the sense of the words of the colloquium, he cited the case of *Hawkes v. Hawkey* (b), where the Court held that that could not be done.

In this instance he contended, that the innuendo had very considerably and materially enlarged the sense of the colloquium, beyond the fair meaning of the words; and therefore vitiated the count, and consequently the declaration. Admitting that the action might have been sustained by the colloquium, without the aid of the innuendo, that is out of the question at present, which is merely whether the declaration is bad; for the first count having this innuendo, which is not supported by any fair exposition of the words, whatever effect the verdict might have in aiding the defect of the second count, the statutes of *Jeofails* could in no way be applied to the first count; and he submitted therefore that the judgment should be arrested.

*Cur. adv. vult.*

(a) 6 T. R. 691.

(b) 8 East, 427.

RICHARDS, *Lord Chief Baron*, now delivered judgment. The questions in this case are, whether the innuendo in this declaration is supported by the colloquium? and whether, if it be not, it may be rejected as surplusage? (stating the declaration &c.) We do not consider that the innuendo is agreeable to the sense of the words on which it is founded, or that they are to be understood so largely. The defendant does not say that *Hofer* was a person in such circumstances as that he might safely be trusted by all the world. He states merely that *he himself* was ready to give him credit: and so he might have been, and there was nothing in so saying, without much more, which could have the effect of misleading the plaintiff.

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On the other point we are of opinion, that without this innuendo, the words would not be sufficient to support this action if they were proved. I may lend a man money, and consider that I was safe in doing so, although he might not be in good circumstances, and I knew it; but telling another that *I* would do so, by no means implies that *he* might. The other part of the colloquium proves that to be the construction which the defendant himself put on his own words, and that he so confined them; for, he says, that *Hofer* had owed him money, and had paid it. As we think therefore that the innuendo is not warranted by the words, and that without it they would not be sufficient to maintain the present action, we are of opinion, that the rule for arresting the judgment must be made absolute.

Rule absolute.

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Monday,  
24th May.

WARN and Ux. Administratrix, &amp;c. v. BICKFORD.

Assignment of breach of covenant in general words, although in the words of the covenant, held ill upon a demurrer to the defendant's plea, because the assignment did not shew any particular act of the plaintiff, or in what particular respect he had refused to act which amounted to a breach of his covenant.

Such bad assignment not cured by pleading over a set-off of a demand (claimed in a different right from that in which the plaintiff, who was an administratrix sued) to a declaration in covenant for unliquidated damages.

THIS was a demurrer to a plea of set-off to a declaration in covenant by the plaintiff and his wife, as administratrix of her former husband, on the ground, that the subject-matter of the set-off was not due from the wife in the same right; and it was admitted that that plea could not be supported: but the defendant relied on an objection to the declaration, that the breaches of covenant were not well assigned.

The declaration stated that the defendant (by indenture of demise to trustees) did thereby covenant, promise, and agree, to and with *Thomas Bickford* (the intestate), that he or his widow and child, or children, and their descendants, should and lawfully might, during &c. peaceably and quietly, respectively have and enjoy, and receive and take annuities of 100*l.* and 20*l.* (secured to them thereby); and that defendant or any claiming under him *should not nor would hinder, molest, or disturb him, her, or them*, in the peaceable enjoyment thereof in any manner whatsoever: And further, that defendant should and would, from time to time, and at all times thereafter, *upon every reasonable request*, and at the cost and charges in the law of the said *Thomas Bickford*, or the person or persons requiring the same, *make, do, acknowledge, execute, and suffer,*

or

*or cause &c. all and every suit, further, and other lawful and reasonable act and acts, thing and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting and securing the said several annuities, and raising the said sum of 400*l.*, thereby respectively intended to be granted, secured, and raised.*

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Upon that covenant the plaintiff assigned, amongst others, the following breaches (being the third and fourth)—that defendant did not nor would permit and suffer plaintiffs peaceably and quietly to have (&c.) the said annuity; but, on the contrary thereof, then and there *hindered, molested, and disturbed the plaintiffs*, in right of plaintiff's wife and her children, *in the peaceable enjoyment of the said last-mentioned sum of money* so due for the said last-mentioned annuity, contrary &c. And although said plaintiff afterwards, and after the expiration of five years &c. for the further, better, more perfect and absolute raising the said sum of 400*l.* in said indenture mentioned, to wit, on 1st *January*, 1818, at the proper costs and charges in the law of the said plaintiffs, requested said defendant to make, do, and execute such acts and things as were necessary for raising said sum of 400*l.* in said indenture specified, according to the true intent and meaning of said indenture, yet said defendant *did not nor would*, when he was so requested as aforesaid, or at any time before or since, at the proper costs &c. or otherwise, *make, do, and execute all* OR ANY

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*act or acts, thing or things, which were necessary for raising the said sum of 400l. &c.*

The defendant pleaded *non est factum* and a set-off: and the plaintiffs replied and demurred on the following grounds, that money due from defendant to plaintiff's wife, as administratrix, could not be set-off against, or covered by money due from the intestate to defendant; and that the declaration being in covenant for unliquidated damages, a set-off could not be pleaded.

*Wilde*, in support of the demurrer, anticipating that the defendant would rely principally on the alleged defects in the assigning the third and fourth breaches in the declaration, submitted, that the covenant being in substance—that the defendant would, upon the reasonable request of the person requiring the same, make, do, acknowledge, execute, and suffer all and every such further and other lawful and reasonable acts &c. for the further, better, more perfect, and absolute securing the several annuities, and raising the sum of 400l., as should be, lawfully advised or required by the counsel of the persons interested therein—the breaches being assigned in the very words of the covenant, were well assigned. The defendant covenanted to do *all* necessary acts; the breach is, that he refused to do *any*. He admitted that they were not assigned in the most regular manner, and that they might perhaps have been held bad on *special demurrer to the declaration*; but he insisted, that on this demur-

rer

rer (*to the defendant's plea*) the defendant was not entitled to take advantage of such an objection, or of any of which he could not have availed himself after verdict, or, at least, on general demurrer *to the declaration*.

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He also urged that there was, in this case, no reason for stating a refusal to do any particular; because the refusal was general, and therefore the Court cannot but see, from what is stated on the record, that there was a positive breach of covenant; and that, in a case of this sort, was quite sufficient, unless there be a special demurrer. That was the result of the case of *Jones v. Barkley* (a); and is still more clearly established in the cases of *Charnley v. Winstanley and Wife* (b), and *Bowdell v. Parsons* (c). He submitted, therefore, that as the Court could see from the whole record that there had been in fact a substantive breach of covenant, and that by pleading over the defendant had admitted all that was alleged, which is in principle the effect of pleading over, the breach was well enough assigned to be secure upon a demurrer by the plaintiff to the defendant's plea.

*Erskine*, in support of the plea, admitting the difficulties raised by the demurrer, relied upon the ill assignment of the third and fourth breaches: contending that, as to the third breach, the acts of hindrance ought to be set out, that the Court

(a) Doug. 684.

(c) 10 Ib. 359.

(b) 5 East, 266.



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might see what sort of molestation it was which had been charged, and whether it came within the purview of the covenant, and that a general assignment was insufficient, citing *Fraunces's case*, (a) *White v. Ewer*, (b) and *Wotton v. Hele* (c).

The assignment of the fourth breach, he contended, was still worse, as it did not state any violation either in form or substance of the covenant to which it was meant to be applied; and this being in the nature of a general demurrer to the whole declaration, the defendant might have judgment on that breach, notwithstanding he should be barred for the residue: and he cited *Com. Dig. tit. Pleader* (C 47.), submitting also that here no such request, as the covenant required, appeared to have been made.

He then denied that the defendant having pleaded over in this case, was placed in the same situation as if a verdict had passed against him; and insisted that the Court might decide this case, as if it had come on upon a general demurrer to the declaration, according to the very pointed distinction taken in note 10 to the case of *Wotton v. Hele* (d); and he also cited *Birks v. Trippet* (e). He submitted, that the present case was very distinguishable from that of *Pudsey v. Newsam* (f); because there the covenantor was, at all events, to do some act

(a) 8 Co. 91.

(b) Cro. Eliz. 823.

(c) 2 Wms.'s Saunders, 180,

and note 10.

(d) 2 Wms.'s Saunders, 181.

(e) 1 Saund. 32.

(f) Yelv. 44.

to assure the manor to the covenantee before a certain day, if required, whether necessary or not, or specified or not; whereas here it was not peremptory upon the defendant that he should do any act by a given time, and *non constat* that any act was necessary; or if any were necessary, that it had been required. In this declaration also, there being no averment, that any further assurance was necessary, distinguished it from the case of *Jones v. Barkley* where the Court held, that, by what had passed, the defendant had sufficiently shewn that he was ready to do all that might be reasonably required of him.

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He also submitted, that such a general breach could not be traversed, or if it were, it would be an immaterial traverse.

*Wilde*, in reply, submitted, that most of the difficulties of assigning breaches had been obviated by the statute of *Anne*, and many of the old objections could now only be taken advantage of by special demurrer; and he cited *Foster v. Pierson*, to shew, that in latter times such particularity as had been formerly thought necessary was not required. *White v. Ewer*, he observed, was before the statute of *Anne*; and it was now considered that a breach might be assigned in words as general as the covenant, to avoid unnecessary length in the declaration.

By pleading over, the effect of which is to admit the allegations of the declaration, and that  
 he

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he had broken the covenant, he contended, the defendant had waived the objection, as had been decided by very many cases, *Vin. Abr.* tit. *Plea and Pleadings* (G); and particularly that of *Thorpe v. Thorpe* (a).

*Adv. vult.*

RICHARDS, *Lord Chief Baron*, now delivered the judgment of the Court. We are of opinion that the plea cannot be maintained. We have therefore to consider the objection which has been raised to the declaration, that the breach is stated too loosely and indefinitely: (stating the covenant and fourth breach). It has been urged, that the breach is not more general than the covenant, and that is certainly true. The breach is indeed assigned in the words of the covenant; but, we think, that that is not in this case sufficient; for it does not bring before the Court the subject-matter of complaint: we therefore consider the objection good,

It was then said that the defendant should have demurred specially, and that he has waived what advantage he might have taken of it by pleading over. The Court, however, are of opinion, that he has not waived it. If by pleading over he had shewn a breach of covenant by his plea, it might have cured the defect; but that is not shewn by this plea. Therefore there must be

Judgment for the defendant.

(a) 12 Mod. 455, and 1 Ld. Raym. 662. S. C.

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## The ATTORNEY-GENERAL v. FRENCH.

Monday,  
24th May.

A RULE had been obtained in the early part of the Term by the *Common Serjeant*, calling on the *Attorney-General* to shew cause why the recognizance of bail in this case should not be vacated and discharged, for want of prosecution, on an affidavit, stating that the information was delivered over at the General Seal Day after *Hilary*, 1818, the defendant having been previously arrested and given bail—that in *Easter Term* following he pleaded, and notice of trial was given for the following Sittings, but was countermanded, and another notice was given for the Sittings after the following *Trinity Term*, when the cause was entered and called on for trial; but as there were only four special jurymen, and the Crown would not pray a tales, the cause was not tried—that another notice of trial was then given for the Sittings after *Michaelmas*, when the cause was not tried, for the same reason; and another notice of trial was given for the Sittings after last *Hilary Term*, and the cause was entered, but not tried, nor was the notice countermanded.

Notice of trial of information given from time to time from the Sittings after *Easter Term*, 1818, till the Sittings after *Michaelmas*, when it was given for the Sittings after the next *Hilary Term* (the trial having been postponed for defect of special Jurymen) and the cause was not tried on the last occasion, on account of the absence of a material witness for the Crown, who being expected till the last moment, the notice was not then countermanded—Held a sufficient proceeding effectually to prevent the recognizance of bail being vacated, as it may be where the *Attorney-General* has not taken any effectual proceedings for three successive Terms.

The *Attorney-General*, *Clarke*, and *Walton* now shewed for cause, that notice of trial had been given for the Sittings after *Hilary Term*, but the cause could not be brought on, on account of the absence of a material witness for the Crown,

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Crown, who was expected to attend up to the last moment, which was the only reason why the notice had not been countermanded: and they submitted, that three Terms had not elapsed, under these circumstances, without an effectual proceeding.

The Court held, that, in this case, it had been shewn to their satisfaction, that an effectual proceeding had been had within three Terms, and therefore they

Discharged the Rule:

But they stated, that if it could be shewn that there was reason for supposing that the notices were not intended to be followed up, they should not consider notice of trial and countermand a sufficient proceeding to save the discharge of the defendant's recognizance: nor if the not proceeding to trial accordingly were not accounted for.

END OF EASTER TERM.

**REPORTS**  
**OF**  
**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURT OF EXCHEQUER,**  
**AND**  
**EXCHEQUER CHAMBER.**

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**TRINITY TERM, 59 GEO. III.**  
**AND THE SITTINGS AFTER.**

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**MEMORANDA :**

**IN** the preceding Vacation, Sir *S. Shepherd*, late Attorney General, was appointed Lord Chief Baron of the Court of *Exchequer* in Scotland.

*Charles Warren*, Esq. one of His Majesty's Counsel, was appointed Attorney General to His Royal Highness the Prince of Wales, and Chief Justice of *Chester*.

**GENERAL**

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Thursday,  
17th June.

## GENERAL ORDER.

[From the Exchequer Chamber Minute Book.]

No cause can  
be put into the  
paper of  
twelve, till af-  
ter the return  
of the subpoena  
to hear judg-  
ment.

ORDERED, that in future, no cause be put  
into the paper of twelve, till after the return of  
the subpoena to hear judgment.

Friday,  
18th June.

The ATTORNEY GENERAL v. BEATSON

2 Aug. 1819 263. and another. 2 Cl. & F. 71  
27th June 1819

The legacy  
duty on be-  
quests of per-  
sonal property  
in India, by  
will there, and  
administration  
granted under  
it there, is  
payable, if it  
be remitted to  
England, and  
applied by an-  
other adminis-  
trator in Scot-  
land, under ad-  
ministration  
granted in  
England.

THIS information (filed for the recovery of cer-  
tain duties imposed by the statutes respecting  
duties on legacies) came on to be tried before  
the Lord Chief Baron at Westminster, at the  
Sittings after Hilary Term, 1819, when a verdict  
was taken for the Crown for the sum of 8000*l*.  
subject to the opinion of the Court on the follow-  
ing case:—

*William Hope*, late of *Madras*, in the *East  
Indies*, merchant, in the information mentioned,  
a native of Scotland, having been domiciled at  
*Madras* aforesaid, for twenty years and upwards,  
made a will there, dated 26th January, 1819. He  
embarked on board the *Jane Duchess of Gor-  
don*, on the 30th January, 1809, with his wife  
and family, and sailed from *Madras* for *London*,  
leaving his said will behind him at *Madras*, and  
in about the month of *March* following, the said  
vessel was lost at sea, and every person on board  
perished.


The said *William Hope* was possessed of considerable *personal estate at Madras and elsewhere in the East Indies*. On the 19th July, 1811, the Supreme Court of Judicature at *Madras* granted letters of administration, with the will of the said *William Hope* annexed, to *Gilbert Ricketts*, esq. as Registrar of that Court, with the usual powers to demand and receive the credits of the testator and to pay his debts and legacies, and administer his effects in the *East Indies*. On the 13th February, 1812, administration, with the will annexed, was granted by the Prerogative Court of the Archbishop of Canterbury to *James Murray*, who was one of the residuary legatees mentioned in the said will of the said *William Hope*, and in the said information. The effects were sworn to be under 5000*l.* in the province of *Canterbury*. The said *James Murray* was born, and always domiciled in *Scotland*. In the month of February, 1812, the said *James Murray* executed a power of attorney to *John Carstairs*, of *London*, esq. to receive all monies due to him in *Great Britain*; and at the same time the said *James Murray* also executed a power of attorney to Messrs. *Arbuthnot, De Monte and M'Taggart*, of *Madras*, to settle all accounts, and to receive all monies due to him the said *James Murray* (as such administrator of the said *William Hope*), in the *East Indies*. *Gilbert Ricketts*, as administrator, collected the testator's assets in the *East Indies*, paid his debts and the legacies given to such of the legatees as resided in *India*, and paid over the balance to Messrs. *Arbuthnot*,

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 and another.

*Arbuthnot, De Monte, and M'Taggart, as the attornies of the said James Murray. James Murray* died in *Scotland* on or about the 10th day of *October*, 1814, having made a will, dated the 7th day of *September*, 1813, and appointed the defendants executors thereof, and the said defendants proved the said *James Murray's* will in the Prerogative Court of the Archbishop of *Canterbury*, on the 25th of *November*, 1814. Between the month of *February*, 1812, and the month of *October*, 1814, effects of the said *William Hope*, in *India*, to the value of 8000*l.* were collected and received as aforesaid, and remitted by the said Messrs. *Arbuthnot, De Monte, and M'Taggart*, by the orders of the said *James Murray*, from *India*, to Mr. *Carstairs*, the attorney and agent of and for the said *James Murray*, in *England*, and Mr. *Carstairs* remitted the said sum of 8000*l.* to the said *James Murray* in *Scotland*,

The said *James Murray* in his life-time did retain the said sum of 20,000*l.* so remitted from *India* to *England*, and from *England* to *Scotland*, as aforesaid, to and for his own use and benefit, under and by virtue of the said will of the said *William Hope*: and the said sum of 20,000*l.* was part of the residue of the personal estate and effects of the said *William Hope*, deceased. The said *James Murray* was a stranger in blood to the said *William Hope*.

If the Court should be of opinion upon the facts stated, that the said 20,000*l.* is subject to  
 the

the legacy duty, then the verdict entered for the Crown was to stand for the sum of 30,000*l.*; but if the Court should be of a contrary opinion, then a verdict to be entered for the defendants. Either party to be at liberty to turn this special case into a special verdict *if the Court should think proper*,

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*Shepherd*, for the Crown, relied upon the case of *The Attorney General v. Cockerell (a)*,

*Campbell*, for the defendant, endeavoured to distinguish the present case, as the special verdict found expressly, that the testator was domiciled in *Madras*, and administration was granted *there*: and *Murray*, who was domiciled in *Scotland*, had received the money, not as administrator, but as legatee; and that, although he took out administration here, it was not necessary that he should do so. In the case cited, General *Duff* having brought the assets to *England*, it became necessary that the other executor in *England* should prove the will here,

The Court were of opinion that *Murray* was an administrator in fact and in law; and therefore, and because the testator's personal estate had been applied in *England*, they gave

Judgment for the Crown.

Application being made on the part of the defendant, to be permitted to turn the case into a special verdict, the Court refused it.

(a) Ante, vol. i. p. 165.

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Monday,  
21st June.

## GREENWAY v. CARRINGTON \*.

If a small part only of a plaintiff's demand be on a bill of exchange, and the bulk of the debt be for goods sold and delivered, for part of which the bill was given, the Court will not bring back the venue (which had been changed on the usual affidavit) on the ground of the action being brought upon a bill of exchange.

THE plaintiff declared against defendant as the drawer of a bill of exchange, and also for goods sold and delivered.

*Richards* having, on a former day, obtained a rule to change the venue upon the usual affidavit:

*Jones* now moved to bring it back, upon the ground of the action being upon a bill of exchange; and he cited *Ward v. Coclough*, (a) *Rice v. Vinall*, (b) *Evans v. Weaver*, (c) and *Whitburn v. Staines*, (d) in which last case the Court of *Common Pleas* held that the venue could not be changed on an *award*.

[WOOD, *Baron*, said, that case was not in point, and expressed considerable doubt of it as a general proposition; adding, that in the cases there referred to, the whole of the demand may have been founded upon specialty: and he observed, that it would be most unreasonable to hold that the venue could not be changed where only a small part of the demand was founded on a bill of exchange.]

\* *Ex relatione* Mr. R. B. Comyn.

(a) *Barnes*, 480.

(b) *Ib.* 483.

(c) 1 *Bos. & Pul.* 20.

(d) 2 *Ib.* 355.

It

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It appeared by the particulars of the plaintiff's demand, that the sum claimed for goods sold and delivered was nearly treble the amount of the sum for which the bill had been drawn; and that the bill had in fact been given in part satisfaction of the original debt for the goods sold.

*Per Curiam.*—This cause cannot be brought within the general rule, that the venue in an action on a bill of exchange cannot be changed. Here it clearly appears, that only a part (and a very inconsiderable part) of the sum sought to be recovered is due upon the bill; and that in point of fact the bill has been given upon the original demand, viz. for goods sold and delivered; so that this must be substantially considered as an action for goods sold and delivered. It is not enough to say that part of the demand arises upon a bill of exchange; otherwise a plaintiff, by inserting a count upon a bill, might defeat the defendant of his right to change the venue.

*Jones*, therefore, took nothing by his motion.\*

\* Vide *Baskerville v. Cooper*, ante, vol. i. p. 374.

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## IN THE EXCHEQUER CHAMBER.

[Error from the Court of Exchequer.]

## ARGUED AT SERJEANTS' INN.

Tuesday,  
22d June.Coram ABBOTT, Lord Chief Justice, and  
DALLAS, Lord Chief Justice, C. B.Tuesday,  
11th May.

LANE and another v. CROCKETT.

In an action against a sheriff, for removing goods seized under a *feri facias*, without paying the landlord a year's rent, under the statute of 8th of Anne, wherein the plaintiff recovered a verdict, the Court refused a new trial, on the ground that the goods having been afterwards returned, the plaintiff had not been damaged, because while they were in the custody of the law, the landlord could not distrain them.

THIS was an action brought against the Sheriff of *Staffordshire*, by the plaintiffs, who were the landlords of *George Emery*, for a removal of goods &c. taken under a *feri facias* on behalf of a judgment creditor, without paying the plaintiffs a year's rent, according to the provision of the statute of the 8th *Anne*, ch. 14.

On the trial, the Jury found a verdict for the plaintiffs, on the *first* count of the declaration.

In

The want of an allegation in the declaration, that the sheriff had notice of rent due, is not the subject of a motion for a new trial, but should be moved in arrest of judgment.

The Court will not permit a motion to be made in arrest of judgment, after the expiration of the first four days of the Term next after the trial of the cause, and a rule nisi for a new trial has been disposed of. The motion should be made in the alternative in the first instance.

The common allegation of "the defendant well knowing the premises," in the declaration, will, after verdict, cure the omission of an averment, that the defendant had notice of rent being in arrear.—So held on a writ of error founded on that objection. *Quere*, whether any other allegation of notice be necessary?

In *Michaelmas* Term, 58 *Geo.* III., *Jervis* had obtained a rule to shew cause why there should not be a new trial, on the ground that the sheriff, having been proved to have returned the cattle which had been seized, to the premises from which they were taken, the removal was *damnum absque injuria*, as the landlord might then have distrained them — and that as the declaration had not only not averred that the sheriff had notice before the removal, that any rent was due, but had expressly negatived it, the action was not maintainable.

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*Taunton* now shewed cause,\* and

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*Jervis* and *Puller* endeavoured to support the rule.

The Court held, on the first point, that as the goods which had been removed could not be distrained while in the custody of the law, the returning of them to the premises had not exonerated the sheriff.

On the second point, they determined, that the question of the plaintiffs not having brought themselves within the statute, by alleging that the sheriff had notice, could only be raised by motion in arrest of judgment, which — as it had not been made within the first four days of the next Term after the trial, as it might have been by moving it in the alternative when the rule *nisi* was granted — could not now be made; and therefore they

Discharged the Rule.


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The defendant afterwards brought a writ of error on the second point, and being assigned as error, it now came on to be argued—by

*Puller*, for the plaintiff in error, who contended, that the first count in the declaration not having any allegation that the defendant had notice, was insufficient. That count stated the facts in the usual manner, but assigned the breach as follows:—Yet the defendant, then being sheriff &c. as aforesaid, *well knowing the premises*, but not regarding the duty of his said office, nor the statute &c. to deceive and defraud the plaintiffs, in this respect, of the said arrears of the said rent so due to them as aforesaid, and the remedy of the said plaintiffs for the recovery thereof, under colour and pretext of the said writ, on &c. wrongfully &c. and without the knowledge of the said plaintiffs, removed, drove, and carried away the said cattle &c. so taken as aforesaid, from and out of the said tenements and premises, immediately after the said goods &c. were seized and taken by the said defendant, the sheriff, in execution, *and before the said plaintiffs could give notice to the said defendant of the said rent so being due and in arrear from the said tenant to the said plaintiffs as aforesaid*, and without paying and satisfying the said plaintiffs the said arrears &c. contrary &c. (alleging that they had not *since* been paid any part thereof), although the said plaintiffs afterwards, and within a reasonable time after the said goods &c. were so seized &c. and before the said defendant had sold

sold or disposed of the same, and whilst they were in his possession, to wit, on &c. gave notice to the said defendant of the said rent being due and in arrear &c.

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Upon this declaration, where there was not only no allegation of the defendant having had notice of the rent being in arrear before the removal of the goods, but an express negative of any notice till after such removal, it was urged, that the verdict could not be supported. *Waring v. Dewberry (a)*.

ABBOTT, *Lord Chief Justice*.—But the declaration also alleges, that he had knowledge of it. The words, “well knowing the premises,” will be sufficient for the purpose of that allegation; for it must be remembered, that this is after verdict.

DALLAS, *Lord Chief Justice, C. B.*—The statute does not in terms require notice to be given, and the sheriff may, and often does make himself a wrong-doer, where no notice has been given.

The case of *Palgrave v. Windham (b)* being mentioned,

ABBOTT, *Lord Chief Justice*, observed, that not fully understanding the statement of that case in the report, he had looked into the record,

(a) 1 Str. 97.

(b) Ib. 212.



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and found that notice was in fact given to the sheriff, and that the want of notice there spoken of, meant want of notice to the plaintiff in the action on which the execution was sued out. But (observed his Lordship) the allegation of "the defendant well knowing the premises," is sufficient in this case; for it must refer to the whole subject-matter of the declaration. If the present objection could prevail, the object of the statute might often be entirely defeated.

The Court of Error now affirmed the judgment.

Judgment affirmed.

### IN THE EXCHEQUER CHAMBER.

[Error from the Court of Exchequer.

### ARGUED AT SERJEANTS' INN.

Tuesday;  
 22d June.

*Coram* ABBOTT, Lord Chief Justice, and  
 DALLAS, Lord Chief Justice, C. B.

14th May.

RAMSBOTTOM and others v. The KING.

An inquisition taken on a writ of extent finding A. B. indebted to C. D. and the other partners and

THE plaintiffs having brought a writ of error from the judgment of the Court of *Exchequer*, discharging

proprietors of a certain society or company called *The Kent Insurance Company*, is sufficiently certain, without naming the individual members of the company, and although they are not incorporated. Judgment of the Court of *Exchequer* in the case of *The King v. Ramsbottom*; (*ante*, vol. v. p. 447,) affirmed.

discharging the rule to shew cause why the judgment in the cause of *The King in aid of the Kent Insurance Co.* against *Ramsbottom and others*\*, should not be arrested upon certain errors assigned, which were in effect the same as the objections formerly taken to the record, and upon which the original motion was founded. The errors now came on for argument.

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The inquisition, as far as is material, is already set out in the case of *The King v. Ramsbottom*.

*Parke*, for the plaintiffs, insisted, that for those errors upon the record, the judgment of the Court of *Exchequer* ought to be reversed. He contended, as before, 1st. that the inquisition was bad for uncertainty in not stating the names or other sufficient designation of the persons to whom the debt was found to be due.

2dly. That the writ of extent against *Larking* and *Hougham* was insufficient; because the recital does not agree with the mandatory part; and

3dly. That the inquisition was void as not being authorised by the writ, in substance directing such debts to be found as are legally due to *Larking* and *Hougham*, as trustees to the company, whereas the inquisition found the debt to be legally due to the company.

\* *Ante*, vol. v. p. 447.

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On the first and principal error assigned — the uncertainty of the inquisition — in addition to the arguments urged on the occasion of the motion, and the authorities then referred to, the principle laid down in *Coke* upon *Littleton*, (a) was made the foundation of the argument now used, that “ a count or declaration which anciently, and yet is called *narratio*, ought to contain two things, viz. *certainty* and *verity*, for that is the foundation of the suit whereunto the adverse party must answer, and whereupon the Court is to give his judgment. *Certa debet esse intentio & narratio, et certum fundamentum, & certa res quæ deducitur in judicium*. But it must be understood that there be three kinds of certainties, first, to a common intent, and that is sufficient in a *barre* which is to *defend* the party, and to excuse him. Secondly, a certain intent in general as in counts, replications, and *other pleadings of the plaintiff*, that is to convince the defendant, and so in indictments &c. Thirdly, a certain intent in every particular as in *estoppels*,” and to that doctrine was applied the reasoning of the Lord Chief Justice *De Grey*, in delivering the opinion of the Judges in the House of Lords, in the case of *The King v. Horne* (b).

The following cases were also cited on the part of the plaintiffs in error: *The Protector v. Cuttrel* (c), where it was contended, that an inqui-

(a) Page 303.

(b) Cowp. 682.

(c) Hardr. 58.

sition ought to be as certain as an indictment or declaration, and that in an inquisition, finding a lease for sixty years, as the beginning and end of the term were not found, which it was said ought to be, the party grieved could have no remedy, because there was no certainty that he could plead to avoid it—(5 Rep. 120. C. 3. Hen. VII. 11, 12. Plowd. Com. 202. Co. Inst. 303, are there adverted to.)—*The Protector v. Cory and another*, (a) where cases are mentioned of inquisitions being held ill for uncertainty in not having the particulars more fully set out; an anonymous case in *Moore*, (b) where the sheriff had returned that he had extended a tenement of twenty shillings value, and it was held, that “tenement” was not sufficiently certain; *Bateman v. Elman*, (c) where the Court held, that a finding that the plaintiff had delivered divers parcels of plate, was error for uncertainty, because it could not be helped by intendment; *Fenn v. Dire*, (d) *Barnes v. Prudlin*, (e) *Hunt v. Jones*, (f) in all of which cases the judgment was reversed, because the words in the declaration were held to be too general; and in *Hartley v. Herring*, (g) Lord *Kenyon*, when those cases were cited, observed, in deciding for the plaintiff there, that he did not wish to shake their authority. The other cases cited in the Court

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(a) Hardr. 59.

(b) Moore, 8. c. 28.

(c) Cro. Eliz. 866.

(d) 1 Röl. Abr. 58.

(e) Siderf. 396. 1 Vent. 4.

S. C. called Barnes v. Brud-  
del.

(f) Cro. Jac. 499.

(g) 8 T. R. 130.

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of *Exchequer*, in arguing the motion in arrest of Judgment, were now also relied on\*, and the same arguments in substance were again urged in support of the objection of the uncertainty of the inquisition.

The other objections were also put on the same grounds, and the same arguments were used; and the authorities † then cited were now again applied in support of the assignment of those errors also.

*Denman*, in support of the judgment, contended, as to the minor objections, that there was no substantial difference in the distinction which had been taken; and that such a direction to find debts as was given by the writ would authorise the finding, which had been returned: and that the recital of the debt did not controul the mandatory part of the writ, and was not binding on the Sheriff or the Jury.

On the objection of the uncertainty he submitted, that in more modern times, and since

\* *Rushton's case*, 2 Leon. 121. *Wiatt v. Essington*, 2 Ld. Raym. 1410. S. C. Str. 637; and Fort. 377. *Bertie v. Pickering*, 4 Burr. 2455. *Hovel v. Reynolds*, 1 Ventr. 272 and 329. *Copleston v. Piper*, 1 Ld. Raym. 191. *Spalding v. Mure*, 6 T. R. 635. *The King v. Harrison and Co.* 8 T. R. 508. *Cook v. Cox*, 3 M. & S. 110. *The King v. Patrick and Pepper*, 1 Leach Cr. L. 287. (3d edit.) *The King v. Sherington and Bulkley*, 2 Leach Cr. L. 578.

† 16 Vin. Abr. tit. *Office or Inquisition*; C. *Anon.* 1 Ventr. 259. *Patten v. Perbeck*, Salk. 563. S. C. 1 Ld. Raym. 346. 718; and 12 Mod. 355.

the old cases which had been cited in support of that error, a more liberal mode of pleading had been allowed, and the ancient strictness no longer prevailed, at least to a further extent than to require that there should be a *sufficiently convenient certainty* in the record, so that it may appear to the party and the Court, what the subject-matter of the proceeding is, to enable the one to defend himself, and the other to give judgment. Of the cases which had been cited where judgment had been set aside for want of sufficient particularity, he observed, that none of them were founded on the uncertainty of the *parties*, except those of *The King v. Patrick and Pepper*, and *The King v. Sherrington and Bulkley*, and those he distinguished as being *criminal* cases, and therefore not applying on a question of convenient certainty in a civil suit;—and in this case there was such certainty, or at least as it was matter peculiarly within the knowledge of the plaintiffs in error, it lay with them to produce a greater degree of particularity upon the record, by pleading with proper averments as was done in the record of extent, in the case of *The King v. Sanderson (a)*. In this case the plea admits the knowledge of the plaintiffs. The real question he submitted was, whether the *Kent Insurance Company* were recognizable in law as obligors.

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*Parke* in reply, insisted, that a party seeking to recover a demand was bound to put sufficient

(a) Wightw. 54.

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matter upon the record, to enable the defendant to protect himself by the recovery from any future suit for the same debt; and that has not been done here, because, if any of the unknown members of this unincorporated company should hereafter sue the defendant, this recovery could not be pleaded in bar: and that was the true ground upon which the necessity of sufficient certainty was put in the cases of *Bertie v. Pickering*, and *Wiatt v. Essington*. In this case the Crown is the actor, and has no right to set up a vicious record, which may be productive of injury to third persons. He denied that the plea (the general issue) admitted a knowledge of the debt: on the contrary, it traverses the debt and all the allegations of the charge.

The case stood over for judgment till the first error day of this Term, when

The Lord Chancellor, attended by the Lords Chief Justices of the other Courts, and the Court of *Exchequer*; pronounced the

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

[Error from the Court of Exchequer.]

ARGUED AT SERJEANTS' INN.

Coram ABBOTT, Lord Chief Justice, and  
DALLAS, Lord Chief Justice, C. B.

35 Bea 329 DURANT v. TITLEY.

57 How 399

44 N. 48 1106 124 J. 2 Ca. 588

See 5 B. & C. Tuesday,  
22d June.  
See 12 B. 354.  
2 Giff. 509

THIS was an action of covenant, on a deed of separation between the plaintiff in error and *Mary Anne* his wife, of the one part, and the defendant in error of the other part, bearing date the 22d November, 1809, whereby (reciting the marriage and subsisting differences) the plaintiff covenanted for himself, his executors and administrators, with the defendant, to pay him an annuity of 500*l.* during the joint lives of the plaintiff and his said wife, *in case she should live separate and apart from her husband, and should take one of her children by her said husband to live with her*: and it was also agreed between them, that it should be lawful for her, whenever she should

A deed made between husband and wife, and a third person (a trustee) with a covenant by the husband to pay such third person an annuity, in case the wife should live separate and apart from her husband, and should take one of her children to reside with her, is (*semble*) void, as being a deed made in contemplation of a future separation at the pleasure of the wife, and therefore con-

trary to the policy of marriage.

*Semble*, a plea to an action of covenant on such a deed, that the wife afterwards lived and cohabited with the defendant for a long space of time, and then left him against his will and consent, and had ceased to live or cohabit with him since, is a good plea.

Judgment for plaintiff, on a demurrer to such a plea, by the Court of Exchequer, reversed, on a writ of error.



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should live apart from her husband, to take any one of her children by her husband which she should fix upon, to reside and live with her, except the eldest.

The declaration averred, that on the 8th *May*, 1817, the wife had discontinued to reside and live with her husband, and did live separate and apart from him, and had ever since continued to do so, and that she had at all times since she had so lived separate and apart from her husband, been ready and willing to take one of the children by her husband, not being the eldest, to live with her; and that she did afterwards fix upon one of such children, named *Anguish*, and did request her husband to permit the said child to reside and live with her, and that he refused to permit the said child so fixed upon by her, to reside and live with her,

The defendant pleaded (protesting that the said indenture and the said declaration were bad in law), that *after the making of the said supposed indenture*, in the said declaration mentioned, and *before the commencement of this suit*, the said Mary Anne lived and cohabited with the said George for a long space of time, to wit, for the space of seven years and upwards, from the time of the sealing and delivering of the said indenture, and afterwards, to wit, on the said 8th day of *May*, 1817, the said Mary Anne, *without the consent, and against the will of the said George, quitted and left the said George*, and had  
ceased

ceased from thence thitherto to live or cohabit with the said *George*: and the defendant further pleaded, that *the said* Anguish, *the said child* in the said declaration mentioned, was *not born at the time of the sealing and delivering* of the said indenture, but long afterwards.

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TITLEY.

To that plea the plaintiff demurred.

The Court of *Exchequer* having given judgment for the plaintiff, the defendant brought a writ of error: and the case now came on for argument before *Abbott*, Lord Chief Justice, and *Dallas*, Lord Chief Justice (C. B.), in *Serjeants' Inn*, at the Chambers of the Lord Chief Justice.

1818.  
28th Jan.  
Hilary Term.

*Peake*, Serjeant, in support of the errors assigned, contended, that the action could not be supported: or if it could, that the plea was a good defence; for that

1st. The deed being made in contemplation of *a future separation* of a husband and wife, *at the pleasure of the wife*, it was contrary to the policy of marriage, and void in law: and

2dly. That as the deed contemplated a separation in the state in which their family was at the time when it was made, and in such an event provided for the maintenance of the wife and one of the then existing children, it did not therefore apply to the event which had happened, of the wife leaving her husband, and taking with her an *after-born* child.

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The case of *Lord Rodney v. Chambers* (a), he admitted, was an authority in some respects in favour of the validity of such a deed as this; but of the judgment of the Court in that case, he observed, that it had been reluctantly given, professedly under the pressure of authority; and although this sort of contract was there stated to be against the policy of the law. Since that determination, he submitted the principle and the general application of it had been much narrowed; and first by what fell from Mr. Justice *Lawrence*, in the subsequent case of *Chambers v. Caulfield* (b), who said, in allusion to *Rodney v. Chambers*, "In that case there was an averment that the separation was with the consent of the trustees. We thought there was nothing illegal in the parties agreeing to refer the question, what was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. *The Court therefore only decided in that case, that a covenant for separation, and separate maintenance, with the consent of the trustees, was good; not that a covenant was good generally, that a wife might separate herself from her husband whenever she pleased; for that would be to make a husband tenant at will to the wife, of his marital rights.*" So far that case is an authority in favour of the plaintiff in error. In *Marshall v. Rutton* (c),—where it was held, that a married woman separated from her husband by deed, with separate maintenance, was not liable to be sued as a *fême sole*—Lord *Kenyon*,

(a) 2 East, 283.

(b) 6 East, 252.

(c) 8 T. R. 545.

delivering

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delivering the opinion of the whole Court, said, "That (the agreement to live separate) is a contract supposed to be made between two parties, who, according to the text of *Littleton*, s. 168, being in law but one person, are on that account unable to contract with each other; and if the foundation fail, the consequence is, that the whole superstructure must also fail. This difficulty meets the plaintiff *in limine*. If it did not, and the parties were competent to contract at all, it would then become material to consider how far a *compact could be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life*, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them, in others, subject to the consequences of being married; and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument, some of those difficulties were pointed out, and it was asked, whether, after such an agreement as this, the Temporal Courts would prohibit, if either of the parties were to sue in the Ecclesiastical Court for the restitution of conjugal rights? Whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction? Whether they could be witnesses for and against each other? Whether they could sue and take each other in execution? And many other ques-

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tions will occur to every one, to which it will be impossible to give a satisfactory answer. For instance, it may be asked, *How it can be in the power of any persons, by their private agreement, to alter the character and condition which by law results from the state of marriage, while it subsists, and from thence infer rights of action, and legal responsibilities, as consequences following from such alteration of character and condition? or how any power short of that of the Legislature, can change that which by the common law of the land is established as the course of judicial proceedings?*" In *Beard v. Webb* (a), on a question whether a woman could be sued in the Courts of *Westminster Hall*, as a *feme sole trader*, on the custom of *London*, Lord *Eldon* adopted the same line of argument: and that case was decided before the determination of *Marshall v. Rutton*. In *Wilkes v. Wilkes* (b), Sir *Thomas Clarke*, Master of the Rolls, refused to decree that the husband and wife should live separate, according to articles of separation, though he carried other parts of the deed into execution. In *Fletcher v. Fletcher* (c), Mr. Justice *Buller*, sitting for the Chancellor, refused to decree a specific performance of articles of separation, where the wife had returned to her husband, and cohabited with him for some days, and (dismissing the original bill) upon a cross bill, ordered the articles to be delivered up and cancelled. The

(a) 2 Bos. &amp; Pul. 93.

(b) 2 Dick. 791.

(c) 3 Bro. C. C. 619, *in notis.*

reasoning

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reasoning of the Lord Chancellor (Lord Rosslyn), in pronouncing the decree in the case of *Legard v. Johnson (a)*, is in many respects very applicable to this case, and his comments on the various authorities, also tend to shew that, in his opinion, deeds of this nature are not to be encouraged, and that Courts of Equity are not competent to give effect to such deeds, as against the husband.

The doctrine upon which the decree in that case was founded, and all the cases are there brought under consideration, is very material as applying to the present. The Lord Chancellor observes, in delivering his reasons, "The first is a general question, whether, taking it in the largest extent, a suit in Equity is competent to give effect, by the aid of this Court, to a deed of separation between husband and wife? To state the case as a general question fairly, I must suppose articles of separation, *from discordant tempers, without reproach either on the one side or the other*. Can I, under such circumstances, find a case to entitle the wife to a personal decree against the husband? *I cannot state the transaction to be higher in point of law than a personal contract stante matrimonio between the husband and wife*; but I must go farther, and consider *that contract a separation* by which they exclude and exonerate one another, as far as they can, from the rights and duties arising from matrimony. *The common law will not entertain a suit upon contract by a wife against her husband*. Such a

(a) 3 Ves. 358.

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contract is incapable at law of producing any action. The Ecclesiastical Court, according to the jurisdiction of this country, has exclusive cognizance of the rights and duties arising from the state of marriage. Therefore I am completely at a loss to discover an Equity to control the common law, and *admit a suit between husband and wife upon a personal contract* (the case I am now putting) and supersede the exclusive jurisdiction of the Ecclesiastical Court by entering into the consideration of it. In looking through the cases from the time the reports commenced to be tolerably accurate, soon after the Restoration, when the jurisdictions were again established, I find that not an idea of that kind was entertained in that famous case of *Whorwood v. Whorwood (a)*, in any account of it. Soon after the civil war there had been a decree by the Lords Commissioners. There being no Ecclesiastical Court, the jurisdiction by some way or other got here. After the Restoration, when the jurisdictions were established again, the decree of the Commissioners was to be reviewed. Lord *Clarendon* was assisted; and after great discussion, it ended in throwing the case back for the decision of the competent jurisdiction. The next case is *Mildmay v. Mildmay, (b)* soon afterwards: Lord *Nottingham* would not entertain any jurisdiction upon a contract between husband and wife; and in *Hincks v. Nelthorpe (c)* a demurrer was put in to the discovery, upon the

(a) 1 Rep. Ch. 118. 1 Ch.  
 Cas. 250. Rep. Temp. Finch,  
 153.

(b) 1 Vern. 53. 2 Ch. Ca.  
 402.

(c) 1 Vern. 204.

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ground that it was not a matter properly examinable or relievable in this Court: and the demurrer was allowed, and the jurisdiction disaffirmed. In the opinion Lord *Hardwicke* gave in *Head v. Head* (a), there is the same opinion of the defect of jurisdiction in the general case in this Court: and he observed, that where the Court had interfered, they had very unwillingly acted at all. *Those cases to which he alludes, where the Court had acted at all, stand under three heads: where a third party had intervened, and it was not only between the husband and wife. A third party binding himself to indemnify the husband against the debts of the wife, the interest of that party raises a consideration for that party, between whom and the husband there might be a contract, and with regard to whom he might bind that party to himself. That was the case of Seeling v. Crawley* (b). The circumstances there were a little favorable. The third party was father to the wife. He bound himself to indemnify the husband. The next case, *Augier v. Augier* (c), is governed by the same circumstance; but other circumstances were also interposed, which in point of expedience recommended the case considerably to the attention of the Court. A suit for separation had proceeded in the Ecclesiastical Court for bad usage &c. That depending, an interposition of friends had taken place. The suit was compromised in the Ecclesiastical Court; and upon the consideration of that com-

(a) 3 Atk. 295. 547. (b) 2 Vern. 386. (c) Pre. in Ch. 496.



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promise, *there being also a third party there*, the decree directed the husband to pay conditionally, and a full security was given to the husband. *Certainly neither of these cases can be quoted as an authority that this Court, upon the general and simple question between husband and wife, can entertain a suit upon a contract in which the wife only claims a separate maintenance against the husband.* The other cases which I do not state, are, where a fortune *accrued to the wife after separation*, and an application was made to this Court upon a very plain ground, *that some provision should be made for her out of a fortune coming under those circumstances.* The principle is plain, if it happens from the situation of the parties that they cannot enjoy in common that which would maintain both: it would be very hard that *the party from whom it moves* should lose, and the other should gain the whole benefit. Another case, in which the Court may take into its consideration the rights and duties arising from the relation of marriage, is *where the property is only to be sued in this jurisdiction*—where a trust is created, and there is no coming at it by the common law. That was the case in *Sidney v. Sidney (a)*, and the other case quoted in the note upon that case, where, as a ground to give effect to articles made upon marriage, this Court considered the estate vested according to the articles; and the husband having used the estate as he ought not to have done, and as he could not have done in point of law, if the

(a) 3 P. Wms. 269.

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articles had been completely executed prior to the marriage." His Lordship also observed in the same case, that he had met with no case except that of *Guth v. Guth* to entitle the Court to hold such a jurisdiction; and that before he should decide according to that case, he should wish for a further account of it, *as his opinion inclined against it*. In the case of *Lord St. John v. Lady St. John* (a), the Lord Chancellor disapproves of the cases of *The King v. Mead*, (b) *Guth v. Guth*, (c) and *Lord Rodney v. Chambers* (d), and all the *dicta* favoring the result of those cases; and he considers those of *Beard v. Webb* (e) and *Marshall v. Rutton* (f), as good law. His Lordship there gives a strong intimation of his opinion, that such contracts are not binding, because not permitted by the law, and that they ought not to be the foundation of an action or suit in Equity. In the recent case of *Worrall v. Jacob* (g), the Master of the Rolls declared that the Court would not carry into execution articles of separation. Upon all these authorities he submitted the deed of separation in this case was void. Then, he contended, that the cases, which appeared to support the decision in *Lord Rodney v. Chambers*, were distinguishable from the present. The case of *Seeling v. Crawley* (h) was that of an agreement between the husband and the wife's father for returning the wife's portion (for a valuable consideration), moving from the father. In *Ni-*

(a) 11 Ves. 526.

(b) 1 Burr. 542.

(c) 3 Bro. C. C. 614.

(d) 2 East, 283.

(e) 2 Bos. &amp; Pul. 93.

(f) 8 T. R. 545.

(g) 3 Meriv. 268.

(h) 2 Vern. 386.

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*cholls and Darroers v. Darroers* (a) there was nothing applicable to the determination of a question, whether a deed of separation were valid: and in *Orendon v. Orendon* (b) the decree was merely for maintenance out of the marriage portion, where the wife had been compelled by the husband's cruelty to separate from him, till cohabitation. The case of *Augier v. Augier* (c) was expressly denied by the Lord Chancellor, in making it, to be a decree of alimony and separation. He said it was merely to supersede the necessity of a suit for alimony—merely, in short, in furtherance of what the law would have compelled in case of ill treatment of the wife by the husband: and as to *Gawden v. Draper* (d) the Court said in the principal case (*Lord Rodney v. Chambers*), that that decision did not go the length contended for.

On the second point, he submitted, that if such a deed were valid, under any circumstances, it would not be so under those of this case, as children were born after the deed was made; which with the subsequent cohabitation would render the deed void: and that doctrine was deducible from the case of *Fletcher v. Fletcher*. Upon the whole therefore he submitted that this judgment ought to be reversed.

*Puller*, in support of the judgment, submitted, that this was a pure question of *strict law*: and that it was fully and solemnly settled by the case of *Lord Rodney v. Chambers*, after the most elab-

(a) 2 Vern. 671.

(b) Ibid. 493.

(c) Pre. in Ch. 496.

(d) 2 Vent. 217.

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borate discussion, that the legality of such a deed had been long established by a series of authorities not to be shaken—that this sort of contract was in effect nothing more than a provision for any other separate property of the wife, to be exclusively enjoyed by her. Having very particularly adverted to the judgment of the Court in that case, he observed, that the legality of the sort of contract being there so completely recognized, the principle could not be impugned by any of the *dicta* which had been cited from some of the cases in the Court of Chancery. In this case it would be most material to keep in mind, that in the deed in question the parties treated, through the medium of a trustee, a circumstance which had been in all the cases considered as operating strongly in favour of its establishment; and the Courts of Equity have held themselves bound when a trustee had been made party, where otherwise they might not. The question however would depend upon the weight of authority on either side. There can be no doubt that this sort of contract was considered to be binding in law down to very recent time, and its legality was fully recognized in Courts of Equity. The case of *Guth v. Guth* is a very strong authority to shew that, as against the husband, a Court of Equity “will enforce an agreement for a separation upon a bill filed by the wife, though the husband has declared his readiness to take her home again.” The case of *Fletcher v. Fletcher* appears even by the very short note of it to have been one where the husband had made out a strong *equitable* case in his favor, which would be always

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ways a sufficient answer to a suit in a *Court of Equity*. In this case however the defendant in error stands on the covenant in the deed of the defendant in a Court of Law; and the equitable decisions which have been cited in opposition to this claim, do not affect the proposition on which it is founded, that such covenants may be recovered upon at law: and he relied upon the cases cited in that of Lord *Rodney v. Chambers*, as well as the principal case, from all of which, he contended, the authorities cited, as militating with that doctrine, were entirely distinguishable, not only as being cases proceeding upon the equities of the parties, but in their facts and circumstances. He further urged, that it was incumbent on the plaintiff in error to shew that the contract was illegal, in order to avoid it; and that the question should be considered as if there had been a decree of the Ecclesiastical Court for separation *propter sevitiam*. In *Beard v. Webb* and *Marshall v. Rutton* the question was, whether the contract superseded the authority of the Ecclesiastical Court? And those cases could not be applied to a question of validity of the contract. He therefore submitted, that the judgment of the Court of *Exchequer* should be affirmed.

The opinions of the two learned Chief Justices, before whom the case was argued, having been in the mean time signified by them to the Lord Chancellor, the Court of Error on this day

Reversed the Judgment.

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IN THE EXCHEQUER CHAMBER.

[Error from the Court of Exchequer.]

ARGUED AT SERJEANTS' INN.

*Coram* ABBOTT, Lord Chief Justice, and  
DALLAS, Lord Chief Justice, C. B.

COURT v. PARTRIDGE and Wife, Administra-  
trix, &c.

Tuesday,  
22d June.

THE defendant, in this case, against whom judgment was given on the demurrer, in the Court of *Exchequer*,\* brought a writ of error upon that judgment, which was argued by

Counts on *promises made to an intestate* may be joined with counts on *promissory notes*, given to the administrator, as administrator, since the death of the intestate, because, where when recovered, the amount would be assets.

*Littledale*, on the errors assigned, and by

*Chitty*, in support of the judgment of the Court below.

[The arguments and authorities relied upon on either side are fully stated in the report of the original discussion upon the demurrer.]

Judgment on that ground affirmed in error.

The Court now

Affirmed the Judgment.

\* *Partridge and Wife v. Court*, ante, vol. v. p. 412.

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Wednesday,  
16th June.

*7 Mess & W. 596.*

ROBINSON v. LYALL.

The owner (in England) is liable for money advanced to the master at his request for the necessary use of the ship, after her arrival in an English port; nor is the consent of the owner necessary to establish his responsibility.

Nonsuit—on that ground of objection—set aside, and verdict entered for plaintiff, subject to an award of what should be found to be due for the necessary use of the vessel.

THE plaintiff, a ship chandler at *Portsmouth*, brought the present action against the defendant, a ship owner in *London*, to recover a sum of money, furnished to the master to pay seamens' wages and other debts, contracted by the master for necessaries for the use of the ship, at the request of the master, whilst in the port of *Portsmouth*, upon her release from quarantine, on her return to *England*, after an absence of four years and a half, during which she had been hired in his Majesty's Transport Service. Some of the debts at *Portsmouth* so discharged by the plaintiff were contracted on the outward voyage.

It was in evidence on the trial of the cause, before Mr. Justice *Holroyd* and a special Jury, at the last Assizes for *Hampshire*, that the ship having received the orders of the Transport Board to proceed from *Portsmouth* to *Deptford*, the master was obliged to have recourse to the plaintiff for money to pay the seamens' wages &c., *Portsmouth* being a port of discharge, and to pay tradesmens' bills, and the plaintiff advanced the money for which the action was brought: and it was proved by the master (who had been released) that it had been applied to the use of the ship.

It was objected at the trial that these were voluntary advances in *England*: and that the master

master could not render the owner liable even for necessities without his consent; and upon that objection the learned Judge nonsuited the plaintiff, giving leave to move to set it aside and enter a verdict for the defendant, if wrong in point of law.

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Cause was now shewn, against a rule which had been obtained for that purpose, by

*Gaselee and Carter*, who contended, that the money having been proved to have been advanced by the plaintiff for the use of the ship, and so applied, the plaintiff was entitled to recover: citing *Rocher v. Busher (a)*, in which Lord *Ellenborough* ruled that the owner is liable for goods and money supplied to the captain for the necessary use of the vessel, and that the master was a competent witness to prove the plaintiff's case (b), and he had besides been released.

*Pell*, Serjt. and *E. Lawes*, endeavoured to support the nonsuit, submitting, that although in a foreign port an owner would be liable for goods furnished for the use of the vessel through the master; yet if furnished in an *English* port he would not: the reason being that the liability in the former case was founded on the necessity of the thing; but that in the latter, where there was no such necessity, the owner should be applied to, and nothing but his orders or consent would make him liable.

(a) 1 Stark. N. P. R. 27. (b) *Evans v. Williams*, 7 T. R. 481, n.  
 The



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The Court, holding the owner liable for all such money as had been advanced *necessarily*, made the

Rule absolute—for setting aside the nonsuit :

The verdict to be entered for the plaintiff for such sum as should be awarded to be due for seamens' wages.

Saturday,  
19th June.

*Ex parte* the Inhabitants of the Parish of HENLLAN (Denbighshire), in the Matter of an Insuper, for Arrears of Taxes in the Parish.

If there be two collectors of taxes appointed under the 43d Geo. III. c. 99. s. 13. for a single parish, by the Commissioners, one for one division of the parish, called the Upper Parish, and one for another, called the Lower Parish, and they accordingly collect the taxes

CLARKE had obtained a rule, calling on the Attorney-General to shew cause why the Commissioners for the affairs of Taxes, acting for the division of *Isaled*, in the county of *Denbigh*, in the said order mentioned, should not proceed to make a re-assessment upon the parish of *Henllan Isaf*, otherwise *Lower Henllan*, of the several sums of 39*l.* 19*s.* 8*d.* for land-tax for 1815; 299*l.* 9*s.* 8*d.* assessed taxes for 1815; 212*l.* 10*s.* 4*d.* for property

separately from the several inhabitants of their respective divisions—in case of a deficiency in the amount of the taxes collected, through the misconduct of *either*, the *whole* parish must be re-assessed, and not the particular district the collector of which has misapplied the money, and from the collection of whose taxes the deficiency arises; although the taxes of other division have been collected and paid over to the receiver-general, the appointment being held by the Court to be considered as one appointment of *two* for the parish, which would be valid under the act, and not of *one* for each subdivision, which would be invalid—the converse of the decision in the case of *Barr v. Digby and others*, 1 Bos. & Pul. N. R. 281.

If affidavits run to a very impertinent and unnecessary length, the Court will make the party filing them pay a proportionate part of the costs.

property tax for 1815; 47*l.* 7*s.* 10*d.* for land-tax for 1816; and 267*l.* 17*s.* 4*d.* for assessed taxes for 1816, the amount of the deficiencies of *Owen Owens*, collector of *Lower Henllan*, of the several sums of money before-mentioned, in respect of the several taxes for the aforesaid; and why the assessment, by mistake called a re-assessment of the several sums made by the Commissioners, about the 25th of *September* last, upon the whole of the parish of *Henllan*, including the two parishes or places called *Lower Henllan* and *Upper Henllan*, should not be set aside and vacated: and it was ordered, that service of the said order on the clerks of the said Commissioners for the affairs of Taxes, acting for the said division of *Isaled*, in the county of *Denbigh*, and the solicitor to the Commissioners, for his Majesty's affairs of Taxes, should be deemed good service.

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That order was obtained on various affidavits which had been filed for that purpose, the material substance of all of which was, that *the parish of Henllan*, in the county of *Denbigh*, had always been divided, for the purpose of assessing and collecting the government taxes, *into two divisions* or districts, viz. *Lower Henllan* and *Upper Henllan*—that the accounts of such taxes had been kept separately from each other, and two collectors had been uniformly appointed, one for each *district or parish*—that the Commissioners for the affairs of Taxes, acting in and for the division of *Isaled*, in the county of *Denbigh*, within which the said parish of *Henllan* is situate,

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made two separate assessments of property tax for the year 1815, one to be levied on the *Lower Henllan*, and the other to be levied on the *Upper Henllan*; and that they made further assessments for taxes for the year 1816, one to be levied on the said parish or district of *Lower Henllan*, and the other to be levied on the said parish or district of *Upper Henllan*; and duplicates of the said assessments were accordingly delivered to the collectors of the said districts or parishes—that the duplicate for the parish of *Lower Henllan* was delivered to *Owen Owens*, who had been duly appointed collector of that district *only*, in these words, “Collector’s appointment.—*Isaled*, to wit. To *Owen Owens*, of *Fynnonfair*, one of the inhabitants of the parish of *Henllan*, in the county of *Denbigh*.—By virtue of and in pursuance of the powers and authorities of the acts of Parliament relating to the duties of assessed taxes, we whose names are hereunto set, and seals affixed, being (amongst others) Commissioners for the execution of the said acts, for the said districts, do hereby nominate and appoint you *Collector* of the rates and duties charged and assessed by virtue of the said acts, for and upon the several inhabitants and others of the parish of *Henllan Isaf*, in the said district, for the year ending the 5th April, 1816.—Given under our hands and seals, the 10th day of *August*, 1815.—*J. W. Griffith, E. C. Chambers*, Commissioners.”—That another such appointment was made out in the same terms, and addressed to another person, an inhabitant of the parish of *Henllan Uchaf*, or *Upper Henllan*—the  
said

said collectors were appointed annually in the same manner; and that the said *Owen Owens* was approved by the inhabitants of *Lower Henllan* as their collector, without any reference to the inhabitants of *Upper Henllan*; and that the whole of the said several assessments before-mentioned, to be made on the said district of *Upper Henllan*, had been duly accounted for, and paid to the receiver-general by the said *Robert Davis*, the collector, appointed for the last-mentioned parish or district as aforesaid—that about the year 1817 the said *Owen Owens* absconded, without accounting for about 1200*l.*, which he had collected officially, on account of the property and assessed taxes, in respect of the said several assessments so made on the said parish or district of *Lower Henllan*; and that about the 25th day of *September* last, the Commissioners made a *re-assessment* upon the inhabitants of the whole of the said parish of *Henllan*, including as in one the said two separate parishes or districts of *Lower* and *Upper Henllan*, for the purpose of making good the aforesaid deficiency in the account of the said *Owen Owens* as collector of *Lower Henllan*—that the said re-assessment of the 25th day of *September* was made in consequence of an opinion obtained from his Majesty's principal Commissioners of Taxes, upon an incorrect statement of the facts and circumstances of the case; and that the present application for vacating the same was made upon the suggestion and with the approbation of the said principal Commissioners—that there are four over-

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seers of the poor appointed in the said parish of *Henllan*, two of whom act for the district of *Upper Henllan*, and the other two for the district of *Lower Henllan*; and separate assessments have also been made upon the inhabitants of each of the said two districts or parishes for levying the poor rates; and two churchwardens have always been appointed, one for the district or parish of *Upper Henllan*, and the other for the district or parish of *Lower Henllan*—that the inhabitants of *Upper Henllan* paid sixpence in the pound for church rates, while the inhabitants of *Lower Henllan* paid only threepence in the pound—that some time in or about the year 1787, *William Pierce*, who was at that time the collector of taxes for the said parish or district of *Upper Henllan*, was deficient in his accounts of the taxes assessed upon the district, and *that the deficiency was made good by the said district of Upper Henllan only*, the district of *Lower Henllan*, on being called upon, having actually refused to contribute—and that the inhabitants of *Lower Henllan* were more opulent than the inhabitants of *Upper Henllan*, and of sufficient ability to bear and pay the said deficiencies of their own assessments, occasioned by the default of the said *Owen Owens*, their own collector.

*Peake*, Serjt. and *Parke*, now shewed cause against the rule, upon several affidavits of considerable length, stating in effect, that the two portions of the parish of *Henllan*, known by the distinction

distinction of the Upper and Lower End, constituted together one entire parish — that separate collectors were appointed, solely for the convenience of collecting, and not with any view to separate the interests of the parish — and that the Upper and Lower Ends of the parish had never been called *parishes*, in any other documents than the collectors' appointments, or for any other purpose. They also stated, that there never had been separate vestries for parochial purposes — that whenever a general acting overseer was appointed, it was for *the whole parish*, and the accounts were not kept separately — that the parish was always treated as one entire parish, in all rates and militia ballots, and in inclosure acts, and that the churchwardens were appointed and sworn for the parish generally, though it was usual, for the sake of convenience, to appoint a resident in the Upper End of the parish to be one, and a resident of the Lower End to be the other. Some of the affidavits denied that the appointment of *Owens* was without reference to the inhabitants of *Upper Henllan*, and many instances were enumerated of *Henllan* being considered as one undivided parish, having common interests.

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*Clarke*, on the behalf of that part of the parish called *Upper Henllan*, contended, that as the Commissioners had appointed a distinct collector for that division, and had thereby made them separate *districts* or *places* for which collectors were

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to be appointed under the act (43 *Geo.* III. ch. 99. s. 13.), each must be answerable for its own collector: or that even supposing the two collectors were appointed for the whole parish, from the *very terms* of their *several* appointments, the responsibility of the separate districts was expressly kept distinct—and that in a case like this, the Court would entertain such an application as the present, and protect that division of the parish who had been more careful in the selection of a fit person to be collector, from the consequences of the negligence of the other division, the collectors of which must have been kept distinct for that sole purpose; for such a purpose was lawful, and within the authority of the Commissioners: and he cited the case of *Barrs v. Digby and others (a)*, where it was determined, that if a collector of one hamlet, in a constablewick consisting of several, fail to pay over the money collected, the particular hamlet whose collector is in default only is liable to a re-assessment, under the 20 *Geo.* II. ch. 3, and not the whole constablewick, notwithstanding any supposed hardship in the case.

On the other hand, it was contended, that the Commissioners had no authority so to divide the parish, or to appoint two separate collectors to perform the duties of, and cast the responsibility upon, each pretended division—that the language of the statute did not warrant such a construc-

(a) 1 Bos. & Pul. N. R. 281.

tion,

tion, and that such an appointment, if it were in fact made, and there had been any known established division of this parish of *Henllan*, would therefore be void, because the Commissioners could not appoint more or less than two collectors for *each* district or place. They submitted, that the Court would rather give effect to the incongruous instrument of the appointment, rather than render it null; and they insisted, that the case of *Barrs v. Digby and others*, was an authority against the present application, as establishing that the Court may notice the circumstance of the local division of the parish or place, so as to give effect to the act of the Commissioners, notwithstanding any objection that might be made in point of form: and also that the Commissioners cannot appoint more or less than two collectors for any given *place* within their district, by the terms of the act of Parliament.

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Having adverted very minutely to the facts and circumstances of the case, the words of the statute, and the terms of the appointment, as applicable adversely to the rule which had been obtained, they submitted that it ought therefore to be discharged.

*Cur. adv. vult.*

**RICHARDS, Lord Chief Baron.**—The question in this case lies in a very narrow compass. The statute requires the Commissioners to appoint two persons to be collectors for the respective divisions and places within their district. *Henllan*



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was one entire parish; although two divisions were made for certain purposes of convenience to the parish. Two collectors were appointed for the whole parish, and not four for the whole so as to afford two for one division, and two for the other. It was therefore said, that if they are to be considered as two divisions, the appointment would be void; and perhaps, if there were strictly and properly two divisions, constituting two distinct parishes, that might be true. We are therefore called upon to see whether the appointment cannot be sustained, so as so to make valid every thing which has been done, and which otherwise would be void. There are certainly two collectors appointed for what is really a single parish. And as we must presume that the Commissioners intended to make a good appointment, we must consider that they appointed both the collectors for the entire parish; although they have by mistake called each division of the whole a parish, those divisions having been merely made for the sake of convenience, that one collector might collect for one, and the other for the other division. Now, we find from the case in the *Common Pleas* (a), which was cited in the course of the argument, that the Court there thought they might give effect to the appointment of the Commissioners, although it was not strictly formal and regular, and they accordingly put a construction upon the appointment of sixteen col-

(a) *Barrs v. Digby and others*, 1 Bos. & Pul. N. R. 237.

lectors for a constablewick, consisting of eight different hamlets, which, with reference to the act of Parliament, made it valid and effectual, as being in fact substantially consistent with the law.

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On the same principle as the Court proceeded on in that case, we think we may determine this; and as they held there, that where the statute had required the appointment of two collectors, and *no more*, it must be intended that the Commissioners had appointed two for each hamlet, and not sixteen for the constablewick; so here, where the act directs that *two* shall be appointed for every place, and not one, we must infer that the Commissioners meant to appoint *two* for the *whole parish*, as they might legally do, and not *one* for *each division*, which they could not legally do. Taking it therefore that the Commissioners, not meaning to make a void but a valid appointment, and that they constituted both the collectors as for the whole parish, but for the sake of convenience in the collection, directed that one should collect for one part and the other for the other, as mere matter of arrangement, in that view these Commissioners have made a good and legal appointment under the act. In the mode of doing this, their clerk made a formal mistake in the terms of the duplicate; but still, when we see what the intention of the Commissioners was, we must hold it to be in law but one appointment.

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The consequence of that is, that this Rule, which calls for a separate re-assessment on the lower part of the parish, must be discharged.

Rule discharged.

From the manner in which the Court adverted in this case to the unnecessary length and number of the affidavits filed in opposition to the Rule, it becomes proper to notice, that they intimated a determination that in any other such case they would make the party pay the costs occasioned by the obtruding so much useless matter upon the time of the Court and the suitors.

Tuesday,  
22d June.

LOWE, surviving Partner of WYATT v. EGINTON.

Demurrer.

*Pleading.*

Plea to an action of covenant that plaintiff agreed with defendant and his other creditors to execute a composition deed, held ill on general demurrer.

THE declaration (in covenant) stated, that by indenture of 25th *March*, 1796, defendant bargained, sold, assigned &c. certain premises to plaintiff and his partner for a term of years, for securing 400*l.* and interest on 25th *September* following, and such sums as should be paid by them in the mean time for insurance of the premises — Breach.

Defendant pleaded, 1st, payment — 2dly, a set off — and 3dly, that being a trader within the bankrupt

bankrupt laws, and insolvent, on the 31st *May*, 1816, he proposed to plaintiff and the rest of his creditors to execute a *deed* of composition, which was afterwards prepared and executed by the other creditors of the defendant—that it was *understood, arranged, and agreed* between the defendant and the plaintiff, that the plaintiff, as one of the creditors of the defendant, should and would execute that deed in common with the defendant's other creditors—and that defendant, confiding in such agreement, executed the deed, as did all the other creditors except the plaintiff.

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And 4thly, that in consideration of the premises &c. the plaintiff agreed with the defendant to accept and enter into the said arrangement, and take the benefit of the same, and of the said indenture, in common with the other creditors: and also in consideration that defendant would also deliver to plaintiff a certain picture of great value (to wit, 500*l.*): and further, that confiding &c. defendant did deliver said picture to said plaintiff.

And 5thly, that after the said sum of money accrued due, and before the exhibiting the bill of plaintiff, on the 16th *July*, 1816, defendant delivered to plaintiff a certain picture &c. in full satisfaction and discharge of said sum of money &c., which said picture said plaintiff accepted and received in full satisfaction and discharge of the said sum &c.

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The plaintiff replied, joining issue on the first, second, and last pleas, and as to the third and fourth pleas demurred.

*Campbell*, in support of the demurrer, contended, that unless this plea amounted to that of accord with satisfaction, it would not be a good plea to an action in covenant. In this case there had been no deed of composition entered into by the plaintiff, and as the duty accrued by deed, it could not be avoided but by matter of as high a nature—*Com. Dig. tit. Accord (A. 2.)*—that nothing short of *satisfaction* could be pleaded in bar to this action, where the duty accrued by the deed; and he cited *Blake's case (a)* and *Kaye v. Waghorn (b)*. The matter of this plea at the utmost would be but accord, without satisfaction, as in the case of *Preston v. Christmas (c)*. In *Drake v. Mitchell and others (d)* it was held, that a plea to a declaration in covenant that a bill of exchange had been given in payment and satisfaction of the debt due by the deed, was not good; and in this case the agreement was not stated in the plea to have been under seal.

*Chitty*, in support of the plea, submitted, upon the authority of the case of *Steinman v. Magnus (e)* that an agreement entered into by a creditor with a debtor and his other creditors, to

(a) 6 Co. 41.

(b) 1 Taunt. 428.

(c) 1 Wils. pt. 2. p. 86.

(d) 3 East, 251.

(e) 11 East, 390.

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accept a composition in satisfaction of *their* debts, was binding on the plaintiff so agreeing to compound, and therefore was a good plea to an action for recovery of his debt. In that case Lord *Ellenborough* said, "Still more [would such a composition be binding] when, in addition to that [a third person having become surety for the amount] other creditors have been lured to relinquish their further demands upon the same supposition; that makes all the difference in the case, and the agreement will binding." The agreement in that case was not under seal, and if the ground of Lord *Ellenborough's* judgment be the reason of the decision, he contended the principle would apply equally to *all* pecuniary demands, however constituted. He also cited the cases of *Boothby v. Sowden*, (a) *Butler v. Rhodes*, (b) and *Bradley v. Gregory*, (c) to the same point, and he contended, that under the circumstances disclosed in the pleas, the defendant had put a case upon the record which came within the reason and justice of those determinations, and therefore it might be well pleaded in bar of the present action.

*Campbell*, in reply, distinguished the cases which had been cited in support of the plea: In *Steinman v. Magnus*, the plaintiff's demand was simple contract, being founded on a bill of exchange, and not on a deed, and in that case the plaintiff had actually *signed* the agreement to

(a) 3 Campb. 175. (b) 1 Esp. 236. (c) 2 Campb. 383.

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accept the composition. The other cases were also on simple contract demands, and as to that of *Boothby v. Sowden*, Lord *Ellenborough*, on its being cited in the recent case of *Cranley v. Hilary*, (a) observed, that if any thing incorrect was there laid down, it was no reason why the Court should adhere to it; and he adds, that what was there said might, perhaps, be right, as applied to the facts of that case—and it was held there, that it lay on the plaintiff, even under the circumstances before the Court, to shew that the notes to be given for payment of the composition money had been tendered. He therefore submitted that the plea which had been demurred to, could not be supported, and

The Court gave

Judgment for the plaintiff.

(a) 2 M. & S. 120.

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IN THE EXCHEQUER CHAMBER.

[Crown Case reserved for the Opinion of the Judges.]

The KING v. FROUD.

Saturday,
26th June.

THE indictment on which the prisoner was tried at the last Assizes for *Cornwall*, before Mr. Justice *Holroyd*, charged him with forging and counterfeiting an order for payment of money, purporting to have been made by a magistrate of the county, under the 43d Geo. the III. ch. 75.*

The making of a written instrument, purporting to be an order of a magistrate, and to be signed and sealed by J. P. as such, under the 48th Geo.

It III. ch. 75. addressed to the Treasurer of the County Rates, requiring him to pay J. C. a sum of money which he had made oath that he had expended in removing and burying a dead body cast on shore, by means of which the maker obtained that sum of money from the treasurer, is FORGERY; although the prisoner did not obtain the money in character of any of the parochial officers named in the statute, and although there was no magistrate in the county of the name of J. P.

* By that statute it is enacted, that churchwardens and overseers of the poor, where dead human bodies shall be found cast ashore within their parishes, shall remove and bury them so that the expences do not exceed those of other parish burials; and in extra parochial places that duty is to be performed by the constable or headborough.

Sect. 5. enacts, that all the expences are to be paid by such officers.

By sect. 6. it is enacted, that for the purpose of reimbursing them such "payments, costs, charges, and expences, it shall and may be lawful to and for any one justice of the peace for the county or place within that part of the united kingdom called *England*, in which any such body or bodies shall have been so removed and buried as aforesaid, by any writing under his hand, to order and direct the treasurer for such county to pay such sum or sums of money to such churchwarden and churchwardens, overseer and overseers, constable or headborough, for his or their costs and expences in or about the execution of this act (after the same shall have been duly verified on oath), as to the said justice shall seem reasonable and necessary; and such treasurer shall, and he

is

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THE UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF STAFF
WASHINGTON, D. C.
1945

2. The Committee is of the opinion that the Committee should be authorized to

be necessary and correct and required forthwith to pay the sum of \$1000.00 of money to account and directed to be paid to the person or persons empowered to receive the same; and such person or persons to set out the same in his accounts."

the evidence did not amount to a forgery, inasmuch as the paper purporting to be an order of a magistrate, under the act of parliament, was so defective on the face of it, with reference to the terms of the statute, as to be a mere nullity, and that it ought to have been treated as such by the treasurer—that the order was not made for payment of the money to either of the parish officers named in the act, as the act requires; and that there was no magistrate of the name subscribed to the paper.

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Those objections being reserved for the opinion of the twelve Judges, the question now came on to be argued at the bar,

Williams, C. P. for the prisoner, in support of the objections, contended, that the plaintiff could not be held to have been guilty of the capital offence of forgery in the fraud which he had committed; because he had not fabricated the paper in character of either of the parish officers to whom the statute had directed the money to be paid for their remuneration in performing the duties imposed expressly and exclusively on those officers, and which were obviously so imposed on them, as being public responsible persons having official appointments, in order to secure a proper and economical performance of them by those whose general duty it was to serve the parish, in virtue of their situation—that *any* private individuals were not authorized by the act to bury drifted dead bodies; or if they did, magistrates

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had no power to remunerate them, as none but the parish officers named in the act can bury such bodies: all that other persons can do is to give notice to them that such bodies are found cast ashore. (Sect. 3.) The paper was therefore a mere nullity, the tenor of which the treasurer was not only not bound to obey, but was bound not to obey; and if it were such a document, as that being treated as it ought to have been, as a nullity, it would not have been a forgery; it could not be made so by its not having been so treated as a nullity but paid; for it is not the success of the transaction which constitutes the crime of forgery, but the nature of the act, although it should be unsuccessful. In this case the signature affixed to the paper was not the name of any magistrate; and even if it had been, the non-compliance by a magistrate, with the positive directions of the act, would have made a genuine order a nullity, and there could be no forgery of a null instrument.

In *Moffatt's case* (a), a bill of exchange not drawn in compliance with the statute (17 Geo. III. ch. 30. s. 1), for more than 20s. and less than 5l., without the place of abode of payee, and a subscribing witness, being a nullity, a fabricated acceptance of such a bill was held not to amount to forgery. So also in *Wall's case* (b), where the fabricated will would have been void by the statute of frauds, it was held to be fatal to a conviction of

(a) 2 East. Pl. Cr. 954, and
 2 Leach. Cr. Ca. 483. S. C.

(b) 2 East. Pl. Cr. 953.

forgery;

forgery; and in *The King v. Russel* (a) a mere cash memorandum receipted, charged to have been forged, was held not to be a receipt or acquittance for money within the meaning of the statute (2 Geo. II. ch. 25.) The case of *Rex v. Rushworth* (b), he submitted, was expressly in point; it was ruled in that case by Mr. Justice Bayley, that "to bring the case within the statute 7 Geo. II. ch. 22. the order (for forging of which the prosecution was instituted) must be such as, *on the face of it*, imports to be made by a person who has a disposing power over the funds. Mr. Taylor, in his character of a justice of the peace, had no authority to make such an order; if he had any, it was derived from the statute; but he had no power to make such an order as this; and if such a one had been made, the treasurer ought not to have obeyed it." In the present case a magistrate, by a genuine order, had no right to order payment to any one but the official persons mentioned in the act; and if he should do so, the treasurer ought not to obey it; and that is the principle upon which this objection should prevail. On that ground too, he submitted, this case was distinguishable from that of *R. v. Lockett* (c); for there the fictitious instrument had nothing on the face of it which made it a nullity; and the same distinction applied to the cases of *The King v. Graham* (d) and *McIntosh's case* (e).

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(a) 1 Leach. Cr. Ca. 10.

1 Leach. Cr. Ca. 110.

(b) 1 Stark. N. P. R. 306.

(d) 2 East. Pl. Cr. 945.

(c) 2 East. Pl. Cr. 740, and

(e) 2 East. Pl. Cr. 942.

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He also objected that the order did not state that the expences were verified on the oath of a parish officer, as required by the act, or that the expences were necessary.

Carter, contra, relied upon the writing having all the requisites of a valid order, and purporting to be such as, if genuine, would have been sufficient for the purpose of obtaining the money. The act requires no particular form of order, and the magistrate must be presumed to have investigated the claim of the party seeking the reimbursement, and to have satisfied himself of the applicant's right to it, before he would make the order, which was in the nature of an adjudication, stating the necessary facts, the authenticity of which is sanctioned by the magistrate's hand and seal; and those have in the present instance been forged by the prisoner for the purpose of obtaining the remuneration. The order therefore requires no allegation or averment to render it effective; nor would the omission of any such allegation, as had been alluded to, vitiate it. But instruments forged (he submitted) have been held not to furnish objections to a conviction upon them, by defects apparent on inspection, as in the case of *Rex v. Fitzgerald and Lee (a)*, where an objection taken on the ground of the forged will, having a name subscribed, differing from the name of the testator as set forth in the beginning, was held of no avail: and in *The King v.*

(a) 2 East. Pl. Cr. 953.

Gade(a), where an indictment for forging a transfer of stock under the 33d *Geo. III.* ch. 30. s. 2. was held good, although the transfer was not witnessed according to the rules of the bank. He submitted therefore, that on these authorities the prisoner was properly convicted.

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Williams replied, insisting on his former arguments, and the cases already cited.

[*ABBOTT, Lord Chief Justice*, observed towards the close of the argument, that the principal question in this case was, whether there was a jurisdiction in the magistrate to make such an order on the pretended occasion.]

The prisoner subsequently experienced the Royal Mercy upon the terms of submitting to transportation for life.

It is understood that seven of the twelve Judges were for supporting the conviction, *contra* five.

(a) 2 Leach. Cr. Ca. 847.

IN THE EXCHEQUER CHAMBER.

Saturday,
26th June.

[Questions on a Crown Case reserved for the
Opinion of the Judges.]

The KING v. PAGE.

A bankrupt having surrendered in due time, refusing to answer certain questions of the Commissioners regarding the disposal of money assumed by them to have belonged to him, giving as his reason, that he means to contest the validity of the commission, is not guilty of felony within the 5th Geo. II. ch. 3. s. 1.

THE indictment, which was framed on the 5th Geo. II. ch. 30, charged the prisoner [not being &c.] with [feloniously] *not submitting to be examined from time to time upon oath, by and before &c., and with not in all things conforming to the several statutes in force (at the time of passing the act), and [that he did not] "fully and truly disclose and discover all his effects and estate, real and personal, and how and in what manner &c. &c. (in the words of the statute.)**

The

A trader by lying in prison for two months on an arrest for debt, commits an act of bankruptcy, although he may be confined originally, and during the same period under a magistrate's warrant, on the certificate of Commissioners of

* The material part of the first section of that act [to prevent frauds by bankrupts] on which this case turns, is as follows:—That if any person who shall be declared bankrupt shall not, within forty-two days after notice &c. of such commission issued &c. "*surrender him, her, or themselves to the said Commissioners named in the said commission, or the major part of them, and sign or subscribe such surrender, and submit to be examined from time to time upon oath, or being of the people called quakers, upon the solemn affirmation by law appointed for such people, by and before such Commissioners, or the major part of them, by such commission authorised, and in all things conform to the several statutes*

bankruptcy, on the criminal charge of refusing to submit to answer questions; because, as he may at any time be liberated by submission, the lying in prison is voluntary, and therefore within the 21st James, ch. 1. s. 2:—and more especially if his attorney have obtained a Judge's order for his release as to that warrant, upon the Commissioners certificate that they do not mean to examine him further, although the order be not made a rule of Court, or acted upon, and the trader knows nothing of it.

The prisoner was convicted on his trial at the *Old Bailey*, during the *February* Session, before Mr. Justice *Best*.

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tutes already made and now in force concerning bankrupts; AND ALSO upon such his, her or their examination FULLY and truly disclose and discover all his, her or their effects and estate real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times he, she or they have or hath disposed of, assigned or transferred any of his, her or their goods, wares, merchandizes, monies or other estate and effects (and all books, papers and writings relating thereunto) of which he, she or they was or were possessed, or in or to which he, she or they was or were any ways interested or entitled, or which any person or persons had, or hath or have had, in trust for him, her, or them, or for his, her or their use, at any time before or after the issuing of the said commission, or whereby such person or persons, or his, her, or their family or families, hath or have, or may have or expect any profit, possibility of profit, benefit, or advantage whatsoever, except only such part of his, her, or their estate and effects, as shall have been really and *bonâ fide* before sold or disposed of in the way of his, her, or their trade and dealings, and except such sums of money as shall have been laid out in the ordinary expence of his, her, or their family or families; and also upon such examination deliver up unto the said Commissioners by the said commission authorized, or the major part of them, all such part of his, her, or their the said bankrupt's goods, wares, merchandizes, money, estate and effects, and all books, papers, and writings relating thereunto, as at the time of such examination shall be in his, her, or their possession, custody, or power (his, her, or their necessary wearing apparel, and the necessary wearing apparel of the wife and children of such bankrupt only excepted), then he, she, or they, the said bankrupt or bankrupts, in case of any default and wilful omission IN NOT SURRENDERING AND SUBMITTING TO BE EXAMINED as aforesaid, or in case he, she, or they shall remove, conceal, or embezzle any part of such his, her, or their estate, real or personal, to the value of twenty pounds, or any books of account, papers, or writings relating thereto, with an intent to defraud his or their creditors (and being

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It was in evidence that the bankrupt had surrendered himself on the last day for surrender and examination (3d *October*, 1818), and was sworn; but had refused to answer sundry interrogatories of the Commissioners respecting the disposal of certain sums of money, one of them amounting to 500*l*. He was thereupon committed by them; and being brought up again on the 7th and 28th *November* following (having been warned in the mean time), he persisted on both occasions in his refusal to answer the same questions, giving, as his reason, that he meant to contest the commission.

Under those circumstances it was objected by the counsel for the prisoner, that his case was not within the statute. The Judge however charged the Jury, that, if they should be of opinion that in his refusal to answer the questions put to him by the Commissioners, he was clearly actuated by intention to defraud his creditors, they should find him guilty of the felony laid to his charge; but if not, and that he really declined, for the reason given by him, his conduct would not be within the statute. He was found guilty, and the learned Judge reserved the point.

There was also another question raised on the trial, as to whether, in point of law, an act of bankruptcy had been committed by the prisoner;
and

thereof lawfully convicted by judgment or information) shall be deemed and adjudged to be guilty of felony, and shall suffer as felons, without benefit of clergy &c.

and that was founded on evidence of the following facts:—It appeared that, on the 14th *April*, 1818, the bankrupt had been committed to *Newgate* by a magistrate's warrant, on the certificate of Commissioners, under a commission afterwards superseded. From that time down to the 15th *May*, during which interval he was brought up several times by *habeas corpus*, to be rendered in discharge of his bail, and as often re-committed to *Newgate* till he should answer the questions of the Commissioners, he had been a prisoner in *Newgate*; but on that day the Commissioners certified that they did not intend to examine him further, and therefore consented to his discharge: he was then brought up to the *King's Bench* by *habeas corpus*, and committed to the prison of that Court, charged with various declarations, *and with the warrant and rule of the Court*. On the 4th of *June* the prisoner's attorney obtained Mr. Justice *Abbott's* order (of which the prisoner never had notice, as the attorney swore upon the trial) for his discharge from all the detainers against him, *except the actions*. That order however the prisoner did not avail himself of; and it was not made a rule of Court: and he remained in the *King's Bench* till the 15th *August*, 1818, when the last commission issued against him.

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Under these circumstances it was insisted, that the trader's lying in prison, though under civil process for debt, whilst there was a magistrate's warrant in force against him on a criminal charge under which he was also in custody during all the time, was not a lying in prison two months

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on an arrest, or other detention in prison for debt, within the meaning of the 21 Jac. I. ch. 19. s. 2, upon the authority of the case *Ex parte Bowes (a)*, wherein the Lord Chancellor held, that it is not an act of bankruptcy where a trader, being in prison, committed upon a criminal sentence in execution, is, during that imprisonment, charged with debts.

The learned Judge however over-ruled that objection, holding, that a commitment for mere contumacy in *not doing what* by doing, he might be discharged immediately, was a voluntary lying in prison as to the civil causes, and therefore not within the case of *Bowes*; who, being in prison under judgment, could not have procured his liberation by paying his debts, or any other means, till the period of his sentence should have expired. The case was now argued on both points.

Copley, Serjt. in support of the objections which had been taken on behalf of the prisoner, contended, that his refusal to answer the particular questions which had been put to him, for the reason which he had given before the Commissioners, was not within the statute; for the statute has required merely, *in the first instance*, that the bankrupt shall *surrender and submit to be examined*; the surrender itself is a submitting to be examined, more particularly if *any* questions be answered by him. By the 16th section—which necessarily assumes that the bankrupt has

(a) 4 Ves. 108.

entirely conformed with that *first* requisition of the statute, and thereby discharged himself of the felony—it is enacted, that in case the bankrupt shall *refuse to answer*, or shall not satisfactorily answer, or shall refuse to sign his written examination, it shall be lawful for the Commissioners to commit him to prison, until *he shall submit himself to the Commissioners &c.* He contended, therefore, that it was quite obvious, from the terms of the statute, that all the legislature had contemplated, as constituting felony, was, the non-surrender and non-submission to examination; and that they have expressed in words. If however the bankrupt should (having surrendered and submitted to be examined) refuse to answer questions, or to *submit to the Commissioners in that respect*, they are given power to imprison him till he does; for it would be most absurd to enact that a man was to suffer death for *refusing to answer questions*, and also to be committed to prison till he does; whereas, if the true distinction be observed between refusing to surrender and submit to be examined, and a refusal afterwards to answer questions or subscribe his answers, the meaning is quite clear, and founded in reason and good sense. To submit to Commissioners in answering *all* questions put by them, is a very different thing from surrendering to be examined by them; the former, is accordingly made a misdemeanor—the latter, felony.

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He then contended, that the indictment was bad in having omitted to charge the prisoner (as it necessarily must where the fact does not admit
 of

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of it) with not surrendering, as well as not submitting to be examined, for both must be chargeable on a bankrupt to make him a felon: and certainly by far the most important branch of the offence, (for it necessarily includes the other) consists in the not surrendering, if indeed a surrender, and ought to be the most penal: for that purpose, be not *ipso facto* a submitting to be examined, with reference to the 16th section. It cannot be contended, that in this statute, creating a capital offence, the word "and" may be construed "or," and unless it may, a very small proportion of the offence has been committed: according to the general purview of the act, it would be more proper to read the word "and" as meaning, "in order to," or "for the purpose of" submitting to be examined, in which sense it is often used in common parlance, and then it would be quite intelligible and consistent. He contended also that there was in the language of the indictment a most material deviation from that of the statute, which was never allowed in criminal pleading in framing a charge of an offence created by statute, wherein the words must be strictly pursued, the felony being made to consist in not surrendering, and "not submitting to be examined from time to time," and the charge being "not submitting from time to time to be examined." The difference was quite obvious between a successive submission to examination, and a submitting to successive examinations.

Besides the absurdity which the construction contended for by the crown would give to the effect

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effect of the 1st section, succeeded as it is by the 16th, this further incongruity (he urged) would also be found in the 1st section with itself; for if the property, which should be the subject-matter of the question put by the Commissioners, and which the bankrupt had refused to answer for the purpose and with the intention of concealing that property from the Commissioners, turned out to be not of the value of 5s., a bankrupt would be capitally convicted for a concealment by means of a refusal to answer questions, although by the express provision of the statute a felony by actual embezzlement of his property cannot be committed, if the subject-matter be of less value than 20l.

He observed, that, in respect of the practice, there was no precedent to be found among the records of the Courts, of an indictment omitting the non-surrender; and that they all charged uniformly, not surrendering as well as not submitting to be examined. As far therefore as precedent was authority, in the absence of decisions, it was in favour of the objection.

Upon the other point which was preliminary, and depended on the question of law arising upon the facts in evidence, he insisted that a trader who, having been put in prison, by coercion of criminal process should, during the period of his imprisonment under the warrant of the magistrate, be sued for debt, cannot, under such circumstances, be considered a trader, who if being arrested for debt, shall, after his arrest,

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lie in prison two months or more upon *that* or any other *arrest or detention in prison FOR DEBT*," and he is therefore not within the 21st *Jac. L. ch. 19. s. 2.* which has made that an act of bankruptcy:—that it was quite clear that the Legislature contemplated a lying in prison from contumacy or inability to pay only: and a man cannot be said to lie in prison under arrest or detention *for debt*, who is actually all the time a prisoner under a warrant for a criminal offence, and who therefore could not get discharged if he should bail the actions in which he should have been arrested or detained. The arrest and detention under which the party remains in prison, must be for debt exclusively; and in this case the trader was neither arrested nor sent to prison for debt, nor even detained there for debt; because if he had procured his discharge from all the detainers for debt, he must still have remained in prison, and to have bailed the actions would therefore have been an unnecessary expence and a nugatory act. Upon that principle it must have been that the Lord Chancellor held in the case *Ex parte Bowes (a)*, (where his Lordship, upon two distinct occasions so determines) that if a party lying in prison under a criminal charge, be charged with debts during two months of the time, he does not thereby commit an act of bankruptcy, for the foundation of the enactment is the presumed insolvency which must arise from his being supposed not to have sufficient credit to procure bail for his liberation. The Lord Chancellor, in deli-

(a) 4 Ves. 168.

vering his final judgment in that case, said, that he had very considerable doubt "whether upon the construction of the bankrupt laws, it is not of *essential necessity* that the lying in prison should be upon a case of imprisonment *founded in debt, and nothing else.*" That case, therefore, has established, that to make lying in prison for two months an act of bankruptcy, it must be under detention for debt alone: and that an imprisonment under criminal process, which should cover the time of detention for debt, would take the case out of the statute.

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Bosanquet, Serjt. for the Crown, insisted—that the Legislature having expressly required that a party declared bankrupt shall, within forty-two days after notice, surrender himself to the Commissioners *and* sign and subscribe such surrender, *and* submit to be examined from time to time, *and also* upon such his examination shall fully and truly disclose and discover all his effects and estate &c.; and having also enacted that in case of any default and wilful omission in not surrendering *and* submitting to be examined *as aforesaid*, he shall be guilty of felony—a non-conformity with the enactments of the statute in *any one material respect*, would render him liable to be indicted capitally under this act of Parliament. He submitted that the act of surrender was not more material in its effects, or more important to the objects of the statute in the contemplation of the Legislature than the submission to be examined after the bankrupt should have surrendered. The surrender alone, without submitting to answer the

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the questions of the Commissioners, would be an evasion and a mockery of the statute, and would wholly frustrate its beneficial effects, rendering the whole of this statute imposing such important duties on bankrupts, the omission of any of which the Legislature considering as deserving of so high a penalty, quite nugatory. If it would be sufficient to satisfy the act, that the bankrupt should surrender, or if by surrender alone, he would be discharged from the guilt of the felony, he would have nothing more to do certainly than to surrender; but what then becomes of the more beneficial duty required of him of submitting to be examined, and yet it is contended that that branch of the sentence may be rejected as surplusage,

The word "and" is not used to superadd the necessity of surrendering to that of submitting to be examined, but to make the submitting to be examined a necessary result of the surrender, as otherwise the surrender would be useless, whereas there could be no examination without a previous surrender. If submitting to be examined were not necessary, a disclosure of his property might be contended to be equally unnecessary, and that he might withhold such discovery without being guilty of any offence under this statute. That part of the charge at least must be considered as constituting a substantive offence within the terms of this act of Parliament, particularly when connected with a charge of not submitting to be examined with a fraudulent intention by withhold-  
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ing such disclosure of concealing his property ; and that is made a distinct additional ground of offence by the connecting words "and also." It is to these material and essential enactments of the statute that the prisoner has refused to conform, and for the felony in so refusing, he has been properly indicted. The prisoner, having been convicted by the Jury of the offence laid to his charge, they have found by their verdict, in effect, that he being a bankrupt, refused to submit to be examined for a fraudulent purpose, namely, with intent to defraud his creditors by concealing the true state of his property ; and that therefore he is guilty of the felony created by this act of Parliament : and in point of law, according to reasonable construction of the statute, he has clearly been properly convicted.

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He then submitted that the argument, founded on the 16th section empowering the Commissioners to commit to prison parties refusing to be examined, as shewing that the Legislature did not mean that refusal to be examined should be punished with death, was answered and destroyed by the obvious intention that that section was applied to cases of *other persons* than the bankrupt himself refusing to be examined generally, and also to that of the bankrupt himself refusing to answer, under the general head of "*all lawful questions*," other less important questions than those relating to the required disclosure of the state of his property which forms the basis of this charge : and that section, besides, provides

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for many minor things clearly not before provided for by the first section.

So also, as to the inconsistency of the two parts of the first section, if it had been averred in the indictment that the refusal to answer tended to the concealment of property, it might have been necessary to have alleged and proved that the property meant to be concealed was of greater amount than 20*l.*: in point of fact, however, it was in evidence in this case that the property enquired of in this particular instance was infinitely greater than that amount; but it may be put, that the refusal to submit to be examined is *alone* an indictable offence under this statute, without regard to any concealment of property.

On the other point of the act of bankruptcy, the learned Serjeant contended, that as the prisoner had, in fact, remained in prison two months under a detention for debt, he had thereby committed an act of bankruptcy, unless there were any thing in the circumstance of his having been originally sent there by a magistrate's warrant, to take this case out of the statute; and he submitted that there was not. In the case cited (*Ex parte Bowes*) the prisoner was confined under *sentence* of a Court, and was necessarily compelled to submit to imprisonment for the whole term of his sentence; but here he was not confined but until he should choose to be set at liberty: he was not therefore *lying in prison* under the warrant upon which he was *sent there*, and the warrant

was

was then *functus officio*; for it did not require the *detention* of the prisoner. In all events he was lying in prison solely under the civil process in the actions for debt after the 4th of *June*, when he was discharged from all detainers except the *civil actions*. It would, besides, be contrary to all the principles of law, to permit a party so to avail himself of a criminal act, as to be discharged from the consequences of the act of lying in prison under civil process, because he was also imprisoned on a warrant for an offence of a criminal nature.

The result of the deliberation of the Judges upon this case was, that the prisoner was ultimately pardoned.

Eleven of the Judges were present when this case was considered, the Lord Chief Baron (*Richards*) being absent, of whom eight, against the opinion of the other three, held, that the offence, as charged and proved against the prisoner, was not a felony within the meaning of the act of Parliament; but they all were of opinion that the prisoner, by lying in prison under the circumstances, had committed an act of bankruptcy.

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Monday,  
14th June.

# GENERAL ORDER.

[From the Exchequer Chamber Minute Book.]

Where causes are set down for further directions, a copy of the decree, and the Master's report, and the mandatory part of the decree, must be left at the Chief Baron's Chambers two days before the hearing.

ORDERED, that in future, in all cases where a cause is set down for further directions on the Master's report, a copy of the mandatory part of the decree and the report be left at the Chief Baron's Chambers two days before the day of hearing the said cause.

END OF TRINITY TERM.

SITTINGS

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## SITTINGS AFTER TRINITY TERM,

59 GEO. III.

## GRAY'S INN HALL.

[Before the whole Court, except Mr. Baron Wood,  
who was absent during these Sittings.]

TOULMIN and others *v.* COPELAND and The Governor and Company of the BANK of ENGLAND.

Thursday,  
15th July.

**MARTIN**, on the part of the defendant *Copeland*, moved, pursuant to notice, that the Governor and Company of the Bank of *England* might be directed to remove the *distringas* heretofore granted in this cause, from the stock belonging to the partnership in the pleadings mentioned, the defendant *Copeland's* answer having been filed on the 28th *June* last.

The Court will not entertain a motion for directing the Bank to remove a *distringas* from the stock belonging to a partnership firm, on the application of a defendant, the surviving partner, even after an answer has been filed by the defendant, denying all the charges of the bill.

This motion was made with the same view, and in substance on the same ground as that already reported in a former volume (a) under the same name,

Such an application refused, with costs.

(a) *Toulmin v. Copeland and The Bank of England*, ante, vol. vi. p. 405.

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and it was pressed upon nearly the same grounds : the only difference was in the terms in which the applications were made, the former having been made upon an affidavit before the defendant *Copeland*'s answer was put in, whereas that answer had now been filed, *and it denied all the facts charged by the bill* ; but

The Court refused to entertain the motion, observing that a *distringas* was merely *quasi* a subpoena, and the party against whom it should be issued must necessarily obey it—that they had no intermediate control over the process in such a case as this, more than in any other, and could not withdraw it, or prevent its effect—and that the Court had moreover no power to make any order on the Bank. They therefore

Refused the Motion,

With Costs.

The

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The KING (in Aid of STÜCKEY and others) v.  
GIBBS.

Friday,  
16th July.

**LITLEDALÉ** moved, pursuant to notice on behalf of the assignees of the defendant a bankrupt, that the writ of extent which had been issued in this matter, and all proceedings taken thereon, might be set aside for irregularity.

Bankers having money in their house, arising from the assessed taxes, paid in for the purpose of being paid over to the Exchequer, on account of a Receiver General, for the due payment of which by him they have given bond to the Crown, are still entitled to sue out an extent in aid—and that upon affidavit stating generally their having received the money for that purpose; nor is it necessary that they should shew, by allegations in the affidavit made to obtain the fiat, that they are not precluded by the 57th Geo. III. from using the Crown process, as that, being sureties, they have been called upon by the Crown, on

The affidavit on which the writ had issued stated in substance, that the deponent, together with several other persons, bankers and copartners, *were indebted to his Majesty in 4000l. and upwards, arising from the land-tax, and the rates and duties on houses &c. and other assessed taxes paid into their banking house, for the purpose of being paid into the Exchequer, to his Majesty's use, on account of Jefferys Allen, Esq. Receiver General, for part of the county of Somerset: and that the deponent and his said partners were bound to his Majesty by bond of record in this Court, as sureties for the said Jefferys Allen answering, securing, and paying over, on his Majesty's account, the said sum of 4000l. so in their hands, and due and owing from them.*

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account of the default of their principal, or in any other respect.

The Court will not give a defendant leave to traverse an extent, who has let the time within which he ought to plead pass by without doing so, on the failure of a motion to set aside the proceedings.



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The affidavit then stated, that *Gibbs* was indebted to them, in the usual terms, and the common fiat was obtained upon it, as of course.

To that affidavit, the three following objections were taken, founded on the 57th of *Geo. III.* ch. 117. sec. 4. :—

First, That it did not appear from the affidavit, that the bankers were indebted to the King in *the manner* required by the act; for it only appeared that they were indebted to *Allen*.

2dly. That it did not appear from the extent, that any of the bankers were bound to the King for the payment of the duties. And,

3dly. That it did appear that they were only sureties, and it was not stated that *any demand* has been made on them by the Crown, in consequence of the default of the principal.

Upon these objections, he submitted that the foundation of the extent had failed from the insufficiency of the affidavit. As to the first, he admitted that he might be precluded from taking advantage of that, because it did not appear on the face of the proceedings. As to the second, that was founded on the case of the prosecutors of the extent not appearing on the face of the proceedings or being stated in the affidavit, and he contended, that since the recent statute enough should be sworn to shew the Baron who grants the fiat, that the prosecutors are entitled to use the Crown process notwithstanding that statute.

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That objection the Court over-ruled, saying, that as there was nothing in the act requiring such particularity, they saw no necessity for departing from the established form.

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As to the third objection, he submitted that the inquisition should have found the debt from the prosecutors to be due to the Crown upon their bond, nor was any thing stated on the face of the proceedings to shew that they were within the proviso; and that, for the security of the subject, so much particularity at least was necessary since the statute, as should shew the title of the prosecutors to proceed in this extraordinary way, by means of the prerogative writ. They are not bound for the payment of the money, but generally, for the due execution of the office of Receiver General.

*Per Curiam.*—We think none of the objections good. The bankers are security for the Receiver-General paying the money, in effect, and this money in their hands is ear-marked as belonging to the Crown; and as to that, they stand in the situation of the Receiver-General.

*Nil.*

*Littledale* then applied for leave to traverse the inquisition, but the Court refused it, because he had come too late, the inquisition having been taken on the 21st of *May*.

The

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Friday,  
16th July.The KING (in Aid of MYTTON) v. HILL and  
others.

Where the defendants, in an extent in aid, have withdrawn their plea, and suffered judgment to be entered up, upon an agreement to submit to arbitration the question of the amount of what is due to the prosecutor, *provided the award be made by a given time*, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendants having delayed to furnish him with the name of a trustee, which was required to make part of the award, and the defendants solicitor *afterwards*

wrote a letter, requiring that the arbitrator *would take into consideration matters* not before him during the reference, which was refused, as the reference was considered to be closed:—It was held by the Court, that under those circumstances the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority; for that the conduct of the defendants, and the solicitor's letter, was equivalent to a consent to extend the time; and therefore they refused to *set aside the judgment*, and the proceedings thereon, and *the award*, and allow the defendants to plead to the extent.

A RULE had been obtained, in the course of the last Term, by *Chitty*, on behalf of the defendants in this extent (wine merchants), calling on the prosecutor to shew cause why *the judgment entered up* against the defendants, and all proceedings thereon, and also *the award* made in this cause should not be set aside, and the defendants be allowed to plead again to the writ of extent.

The grounds furnished by the affidavits filed upon that motion were, that although the extent had issued for 7400*l.* the defendants were not indebted to the prosecutor in more than 900*l.* or thereabouts, subject however to a claim which one of the defendants had on the prosecutor of the extent for 4000*l.*—that the defendants had offered to pay 1900*l.* provided the prosecutor would refer all matters in dispute to arbitration, but that *Mytton* refused to accept the 1900*l.* on such

A Rule to shew cause discharged; but without costs.

such condition—that defendants therefore pleaded to the said extent, intending to try the question; but that after a considerable time spent in negotiation for a settlement, it was, on the 27th *November*, 1816, agreed to refer the matters in dispute to arbitration—that in order to bring the dispute to a termination, the defendants then having in the meantime suffered great loss and injury in their business in consequence of the extent, entered into a written agreement with the solicitors for the extent, to withdraw their plea, and suffer judgment, with a stay of execution until non-compliance with the award to be made by the arbitrator; and that the sheriff should retain possession of the effects which he then held for the same period, without sale, unless the value should be lodged in his hands—that there should be an immediate reference to an arbitrator, to take an account of what was *bonâ fide* due to *Mytton* from the defendants, on the balance of their accounts, and for interest up to *September*, 1815—that on non-payment of the balance to be awarded by the said arbitrator, *within the period to be named in the award, execution was to issue on the judgment*—that an order of reference was to be made in the cause, according to the terms of the agreement, and that no question of alleged injury sustained by the extent was to be admitted; and the arbitrator was to determine as to the costs and expences of the extent and reference; and the notice of the extent given to the Dock Company was to be vacated,

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vacated, in order to enable the defendants to pursue their trade.

The affidavit also stated, that various meetings took place before the arbitrator, up to the month of *August, 1818, when it was agreed to extend the reference, and accordingly, by an agreement dated the 8th of that month, it was agreed, by consent of the parties, to extend and vary the order of reference, and heads thereof, as follows, viz. That the amount of principal and interest should be extended and made up to the date of the award — that the arbitrator should, from the balance to be found due to Mr. Mytton, deduct 4000*l.* to be settled for the benefit of defendant Richard Hill's children, in the manner therein mentioned — that it was further agreed, that the arbitrator should take into his consideration and award, the liability of Mr. Mytton, as surety for the defendants to the Bank of England: — and the arbitrator was to make his award on or before the 1st of September, 1818.*

That a meeting took place before the arbitrator, after the signature of the said second agreement, but *the said arbitrator did not make and publish any award on or before the said 1st day of September, 1818; and that defendant declined, and never did give any consent, upon application made, to any award being made after the expiration of the time so limited for making the same as aforesaid — that no award in this cause had been served upon defendants, or either of them,*

nor

nor had any demand been made on defendants, or either of them, to perform or abide by any award made in this cause, *nor had defendants, or either of them, received any notice whatever of any such award having been published and declared* in this cause, or of the trusts thereof, save and except, that the defendants solicitors received a letter from the solicitors prosecuting the extent, dated the 12th of *January*, 1819, stating, "that by the award the defendants were directed to pay 915*l.* 10*s.* with interest thereon from the 16th *September* then last, in part satisfaction of the judgment on this extent; and that they (the solicitors) had to request the payment of it in the course of the then present week, or they must proceed to sell"—that notwithstanding notice was given to the solicitors for the extent, by defendants' solicitor, that proceedings under any alleged award would be resisted, and notwithstanding no notice or copy of any such award (save as aforesaid) had been served on or given to defendants, or either of them, the said solicitors for the said extent did direct the sheriff of *Middlesex* to sell the said defendants property, and did actually sell the same, in *March* last, under a writ of *venditioni exponas* issued under and by virtue of the said judgment, conditionally suffered by defendants to be entered up against them, subject to the award so to be made as aforesaid.

On that statement of facts, the Court granted the Rule.

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The affidavit of the solicitor for prosecuting the extent filed in answer to the application, stated, that the prosecutor *Mytton*, in or about the month of *June*, 1818, on his return to *England*, appeared before the arbitrator, who proceeded in the reference, which, after several meetings, and examinations of many witnesses produced, and being attended by counsel on both sides, *was considered as closed by the arbitrator*, on or about the 8th day of *August*, 1818, for all the purposes of his award, which award the said arbitrator then expressed it to be his determination to make, and, as deponent is informed and believes, is still prepared and ready to make, should the same be considered necessary under existing circumstances — that on the earnest recommendation of the arbitrator to the prosecutor and the said *Samuel Hill* in the presence of deponent and the defendant's solicitor, to put an end to all differences, the parties consented to an agreement for the settlement of 4000*l.* in favour of *Mr. Richard Hill's* children, (to be appropriated and deducted from the debt under the said extent in aid) and to the further new terms of reference — that deponent and defendants' solicitor attended the arbitrator, and all the matters of inquiry were discussed and *closed* before him, and, as he expressed, to his satisfaction, before the said 1st day of *September*, and *that the award was prepared on or before that day* — that deponent had been informed by the arbitrator, and believed, that the reason why he did not then deliver his award was, that he had applied before the

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the said 1st day of *September*, to the said defendant *Samuel Hill*, or his then solicitor, for the name of a trustee on the part of the defendants, for the settlement provided for by the said further agreement of reference, and *which he could not obtain* — that deponent never heard of any objection whatever having been made by the defendants, or any of them, or any person on their behalf, to the arbitrator making his award after the said 1st day of *September*; on the contrary, the deponent, on or about *the 8th of September*, 1818, received from defendants' solicitor the copy of a letter of that date, which he had addressed to the arbitrator, at the request of Mr. *Hill*, *urging him to re-consider the subject of his allowances*; and the deponent was informed by the arbitrator, that he declined any further opening of the discussion, conceiving that all the claims of the defendants had been fully considered by him, and that he had informed defendants' solicitor to that effect; nor, to the best of deponent's recollection and belief, did he hear of any objection to the award, *until the month of January following*, when the present solicitor of defendants wrote the letter alluded to in defendant *Samuel Hill's* affidavit — that deponent, on his having been applied to by the arbitrator, before the said 1st of *September*, 1818, stating the difficulty he had had in obtaining the name of the trustee from the defendants' solicitor, then informed him that he should not object to the completion and delivery of the award after the 1st of *September*, and that *he* had not  
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any suspicion that the defendant or his solicitor would attempt to take any advantage on such ground—and that in the middle of the month of *September*, the deponent received the award from the arbitrator.

The *Attorney General*, *Rose*, and *Parke*, shewed cause, insisting, that if there had been in fact any grounds for the application at any time, it had been made too late, and that the Court could not now entertain any question respecting the validity of the award. And they submitted, that if the time of the arbitrator delivering the award in any way affected the original submission, it could not be taken advantage of by the defendants, because the delay had been caused by their own conduct in neglecting from time to time to furnish the arbitrator with the nomination of a trustee to effect the arrangement made for their advantage. Adverting to the letter of the defendants' solicitor, they submitted that it was equivalent to a parol agreement to an extension of the time for making the award which would be sufficient to prolong the period of the arbitrator's authority.

They distinguished this case from that of the common proceeding of moving for an attachment for non-performance of the award, as the only result of this arbitration could be to ascertain for what sum the judgment ought to be entered up, and they urged that it would require a much stronger case than that of a mere delay in delivering the award, to set aside a regular judgment which had  
been

been suspended wholly on the defendants' account, whatever weight such an objection might have in inducing the Court to refuse an attachment.'

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*Roupell* for the defendants, contended, that as the judgment was merely conditional, and depended on the result of the award, it could not be regularly acted upon until the award should have been duly made. The award, however, he insisted, was completely invalid, because it had not been made within the stipulated time, nor had the submission ever been made a rule of Court, nor the terms of the agreement been complied with, as far as regarded the interest of the defendants, and therefore the judgment was irregularly proceeded upon, and the proceedings could not be supported,

As to the letter, he insisted, that having been written after the time when the arbitrator's authority had expired, it could not operate to revive it, or to make that a good and binding award which was at that instant nugatory.

On the point of the delay in making the application, he urged, that the defendants knew nothing of the award, and had never been served with it, nor were they aware that any award had been made; and therefore he contended that it was altogether void, and the whole of the proceedings were irregular, and unwarranted.

RICHARDS, *Lord Chief Baron*, stopping the  
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Attorney General, about to reply.—I think this case quite clear — stating the circumstances from the affidavits. The judgment and award must be taken together, or the judgment would not be regular. The question therefore is, whether this is a good award or not. It is said it is not, because not made in time, that is, not by the 1st of *September*. It certainly was not, in fact, and therefore *prima facie* it could not be good, unless, by the conduct of the parties, they have made it effectual by giving it their assent. I think it is quite clear that they have done so in this instance under the circumstances of the case. Besides, the other conduct of the defendants, all of which speaks a full assent to all that had taken place, there is the letter of their solicitor, written seven days after the 1st of *September*, requiring further matters to be still considered by the arbitrator, which he refuses to do. It is impossible not to hold that letter to be an assent to the enlargement of the time, as it was written with a view to the award which the arbitrator *was to make*.

As to the statement in the affidavits, that the defendants did not know of the award having been made till *January*, 1819; that can hardly be correct. They say, also, that it was never served upon them. It is not the practice to do so, and it is unnecessary. It is the business of the parties to inform themselves of the making of the award, and to require it from the arbitrator. In *March*, the judgment, having been perfected by the award, was executed; but no application

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is made to the Court till *June*. Under all these circumstances I cannot think myself at liberty to consider that the award was not assented to by the defendants,

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GRAHAM, *Baron*, concurring.—This would be an exceedingly clear case in my view of it if it stood upon the letter of the defendants' solicitor alone, for that was an express recognition and assent, applying to all that had then taken place, and no subsequent verbal dissent could destroy the effect of that letter. They were of course aware of all that had been then done before the arbitrator, and that they had no new evidence to produce. Beyond all doubt this amounted to an express consent to enlarge the time,

GARROW, *Baron*.—I consider the letter an authority to the arbitrator, equal even to a rule of Court. If the defendants had meant to rely on the time being out, it was their duty to have refused to give the name of a trustee on that ground, and not to have delayed it from time to time. Instead of doing so, they write this letter, requiring the arbitrator to take into consideration new matters. If the prosecutor of this extent had come to set aside this award, would not his not having objected to this letter, on the ground that it was too late, have equally precluded him? This is an application to set aside the judgment, and the arbitrator had no power to vacate the judgment: he could only reduce the sum.

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Then can we overlook the delay which has taken place before the application was made, from *January* till *June* at least? It is quite impossible that we could comply with it.

Per Curiam.

Rule discharged, but
 without Costs.

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Saturday,
 17th July.

GEORGE and Wife v. HOWARD and Wife, and
 The Governor and Company of The BANK
 of ENGLAND.

A transfer of stock of an intestate into the name of himself jointly with that of the husband of one of his two nieces, accompanied by proof of his having said in his life-time that it was his intention to give the husband the stock at his death, in consideration of affection for him and his wife, and that he had transferred it for that

purpose (if not repelled by counter testimony), held to be sufficient proof of a gift of such stock — and the Court will not continue an injunction granted to restrain the husband (who had administered) from disposing of it.

THIS bill prayed that the defendant *Howard* might be declared a trustee of a sum of 1300*l.* Navy 5*l.* per cent. Bank Annuities, and be directed to transfer the same into the name of the Deputy Remembrancer, to be sold, and the produce divided amongst the plaintiffs — and that he might be directed to deliver up to the plaintiffs all securities for money &c. in his possession which belonged to the intestate, and that if necessary an account might be taken of what should be due from defendant *Howard* to the estate of the intestate,

Such evidence is strong enough to destroy the otherwise equitable presumption, that the transferee is a mere trustee for the transferor, without the aid of a reference or an issue; for however weak the defendants' equity may be in such a case, yet where the plaintiff does not shew any, slight circumstances are sufficient to rebut the *prima facie* presumption.

testate, and to be paid over &c. —and that he might be restrained from selling or transferring the said stock —and the Bank from permitting &c.

1819.

 GEORGE
 v.
 THE BANK OF
 ENGLAND.

The facts charged by the bill were, that the wives of the plaintiff *George* and of defendant *Howard*, were nieces and only surviving next of kin of an intestate, of whose estate the wife of *Howard* procured letters of administration. The plaintiffs having discovered, since his death, that the sum in question stood solely in his name till about eighteen months before he died, and that then he had transferred it into the joint names of himself and defendant *Howard*, who was indebted to him at his death for money lent upon securities in *Howard's* possession.

The defendants *Howard* and wife, by their answer, stated that the stock in question had been transferred into the joint names of the intestate and defendant *Howard*, in pursuance of an intention of the former, frequently expressed in his life-time, to give the same to the latter at his death, in consequence of his marrying the intestate's niece, who had been brought up in his family, and treated as his own child, and who had been left a widow with three children, and had also had a large family by the defendant. They denied being indebted to the intestate at his death, or that defendant ever gave him any security for any money lent —submitting to account.

1819.

 GEORGE
 v.
 THE BANK OF
 ENGLAND.

The Governor and Company of the Bank, by their answer, stated that there was the said sum standing in the name of the intestate on the 26th *November*, 1816, which was transferred on the 5th *August*, 1817, into, and is now standing in the joint names of the intestate and defendant *Howard*, and that the dividends due on the 5th *January*, and 5th *July*, 1817, were received by the intestate, and that the subsequent dividends up to 5th *July*, 1819, were then unreceived.

The defendant proved by the depositions of witnesses, that the intestate had, in conversation upon several occasions, stated that he had given the stock in question, and all his property at his decease, to the defendant *Howard*, and that he had had the stock transferred into their joint names, with a view of securing it to him — that his reason for not transferring it into the name of *Howard* alone was, that it might not be liable to his debts in case of bankruptcy — that he had been informed by his stock broker, that the stock would survive to *Howard*.

The plaintiff furnished no evidence in support of his claim.

Roupell and *Maddocks* relied, at the hearing, on the invalidity of such a *gift* so said to be made by the intestate, without further disposition by will or other instrument, and the danger and mischief of permitting such a case to succeed, founded as it was on mere conjecture of *an intention* to do
 what

what might have been so easily done *in fact*, and by regular means. They urged that a transfer of stock into another's name, particularly when jointly with that of the owner, could never be considered as proof of gift, as such transfers were often made for various purposes of convenience, without any idea of giving an interest: nor could that notion be much assisted in law by proof of loose conversations of an intention expressed of a gift; or if any such intention had really existed at one time, it might have been changed at another, even up to the last moment: and if any surmise of intention could be admitted in a case of this nature, the more natural one would be, that a dying intestate was proof of an intention that both his nieces, who were his only next of kin, should take the personal property he might leave behind. There were, besides, in this case, debts due to the intestate, as to which he had made no disposition, probably for the same reason.

1819.

 GEORGE
 V.
 THE BANK OF
 ENGLAND.

In Equity it has been established, that a transfer of stock into the name of another not being a wife or child, without consideration, constituted the person into whose name it was transferred, a trustee for the person so transferring it. In the case of *Rider v. Kidder*, (a) it was held, that a transfer of stock into the joint names of the owner and another person, for the benefit of the latter, who enjoyed it as a gift by receiving the dividends, was nothing more than a trust for the

(a) 10 Ves. 360.

1810.

 GEORGE
 v.
 The BANK OF
 ENGLAND.

owner and his legal personal representatives. They therefore submitted that this stock must be considered as held in trust for the next of kin of the intestate, and they observed, that on the motion for the injunction which had been granted on the merits, the Court were clearly of that opinion.

Wrottesley for the defendants, contended, that having regard to the near relationship of the parties and the circumstances of the case, as stated in the answer and not contradicted by evidence, supported as it was by proof of the intention of the intestate, to give the stock to the defendant at his death, enough had been shewn to satisfy the Court that they ought not to interfere in a case of this nature to deprive the defendant of the stock in question and to give it to all the next of kin.

The case of *Rider v. Kidder*, he insisted, was altogether very different from the present in its circumstances, and there it was said by the Lord Chancellor, that any evidence of being beneficially entitled, would be sufficient to rebut the presumption of the holder of the stock being a mere trustee: and that case was determined upon the ground that there were no circumstances of any sort to rebut the *prima facie* presumption, and there the holder of the stock was an entire stranger in blood to the intestate. As, therefore, there was no authority in favor of the plaintiffs' claim, and the only case cited rather inclined the
 other

other way, he submitted that no ground had been laid for the interference of the Court in the way required by the plaintiffs' bill.

1819.
GEORGE
THE BANK of
ENGLAND.

RICHARDS, *Lord Chief Baron*.—The case of *Rider v. Kidder* does not apply. That was argued on this ground, that the intestate having purchased the stock with his own money, and transferred it into his own name and that of another person, the presumption is that the other person, if a stranger, is merely a trustee for him whose money it was: and so it might have been presumed here, perhaps, if such were the facts, but in this case stock already purchased and invested was transferred into the name of the owner and the defendant; and if I deliver over money, or transfer stock to another, even although he should be a stranger, it would be *prima facie* a gift. This is a much stronger case than a transfer to a mere stranger, and it lies upon the party denying it to be a gift, to shew some reason for a Court decreeing it to be a trust. Here the mere presumption on which the plaintiffs rely, is rebutted by evidence explaining the purpose and object of the transfer, and there is no evidence offered on the other side to contradict it. As to the objection that this is an odd mode of making a gift, and therefore could not have been intended, that is still nothing more than presumption, and it is answered by the evidence. It certainly was not the best mode, or one which a man of more skill would have adopted in making a gift; but when we have evidence of a reasonable motive for it

in

2 cases, some
presumption
discovered
presumption

1819.

GEORGE

The BANK of
ENGLAND.

in the giver's regard for his neice, and approbation of her husband's conduct towards her, that is sufficient to check any interference on our part to take the stock from the defendant. If the husband had died in the life-time of the uncle, there might have been more difficulty in the matter; but a strong part of the defendants' case is, that the plaintiff has not made out any right, and whether this be a gift or a trust, either way the plaintiff is not entitled to take it away from the defendant.

GRAHAM, *Baron*, expressed himself of the same opinion for similar reasons. This bill seeks to take from the defendant a legal interest, and to do so the plaintiff must raise an equity, which he has not done. Then it is shewn, by evidence, that there was a motive for the gift, and there must have been some intention in making the transfer. That intention is proved by the evidence, which is closely connected with the nature of the transaction, and the intestate's explicit declaration. He had been living in the house of the defendant, and all the circumstances are strongly in the defendant's favor, in whom it is quite clear the intestate had great confidence. On the other hand there is only the presumption that he was a trustee for the intestate's family, and that in order to have completed the supposed gift, it was necessary to do some further act. I am clearly of opinion that upon the evidence (of the sufficiency of which we can judge as well as the Master or a Jury, and therefore may decide without

out a reference or an issue) the plaintiff has not shewn any equity upon which we can act, to make any decree in his favor.

1819.
GEORGE
T.
The Bank of
ENGLAND.

GARROW, *Baron*, concurred — observing, that a man *purchasing* stock may have reasons for its not standing in his own name, but where he transfers stock already in his name into that of another person, it is quite a different thing, and generally proceeds from an intention to benefit the person into whose name it is transferred. In this case it was evidently the intestate's intention to give the defendants the stock, and he has effectually done it, reserving a control over it during his life: and perhaps one object of not giving it by will, might have been to avoid the legacy duty.

Per Curiam.

Declare the 1300*l.* Navy 5*l.* *per cent.* Bank Annuities, to be no part of the intestate's personal estate.

Injunction dissolved.

FORMAN

1819.

Saturday,
17th July.

FORMAN and another v. BLAKE and others, and
in Nine other Causes wherein the same Parties
were Plaintiffs.

Causes in
Equity cannot
be consoli-
dated.

WRAY now moved, on the part of the defend-
ants, in the above causes, that they might be
consolidated; and that the depositions taken on
the part of the defendants in a cause of *Wright*
v. *Southwood and others*, together with the do-
cuments proved therein as exhibits, on the part
of the defendants, might be read and given in
evidence in the said causes, when so consolidated.

The motion was made on the authority of a
case of *Pyke*, widow, v. *Brook (a)*, wherein the
Court are said to have ordered seven different
bills by the executrix of a deceased vicar to be
consolidated into one.

RICHARDS, *Chief Baron*.—I never heard of an
order in the course of my experience for conso-
lidating causes in Equity; nor can I conceive
upon what principle it can be done. There are
many reasons why it should not: and if it be the
practice, it is extraordinary.

Referring to the Register as to the practice, he
stated that there was a case wherein a similar
application had been made about twenty-four years
ago, when the Court refused the application on

account of the difficulties which it might place in the way of the defendants.

Dowdeswell opposed the motion, and

1819.

FORMAN
and another
v.
BLAKE
and others.

The Court refused the application, saying, that it would be necessary first to refer it to the Master to enquire if the causes could be consolidated.

Nil.

The Governor and Trustees of the Free Grammar School of King *Edward VI.* at SHREWSBURY,
v. *MADDOCK* and others.

Saturday,
17th July.

FONBLANQUE moved, on the part of the defendants, that the plaintiffs might be ordered to produce and leave in the hands of their clerk in court, upon oath, all books, deeds, papers &c. in their possession, relating &c. with liberty for the defendants to inspect &c. upon an affidavit stating that the deponent had attended several meetings of the Commissioners named in a commission issued under a decree of the Court in this cause, [a suit for tithes] at some of which the plaintiffs' solicitor had admitted that there were in his or their possession divers documents &c, relating &c. not produced before the Commissioners, which he had refused to permit the defendants to inspect,

The Court will not make an order on plaintiffs (where the cause has been by decree referred to Commissioners) to produce and leave documents &c. in their possession in the hands of their clerk in court for inspection by defendants.

It

1819.

Governor, &c.
of SHREWS-
BURY School
v.
MADDOCK
and others.

It was urged, that as the omission of the usual direction for the production of documents in the decree had created a difficulty in this respect to the disadvantage of the defendants, the Court would now supply that defect by making the order prayed, particularly as the Commissioners had refused to make any order on the plaintiffs for the production of documents required; but

The Court observed, that as Commissioners were an intermediate tribunal constituted for the purpose of making the inquiry referred to them, with competent authority to do all that should be necessary, and were for the time the sworn officers of the Court, as their Master himself was, they must be considered as intending to do all that was fairly necessary on behalf of either party — and that this was an application calling on the *plaintiff* to produce documents, and *therefore* unusual. They enquired if there were any precedent of a motion of this sort having been granted, and said, that unless there were, they would not make an order which was in substance an alteration of the original decree upon so novel an application.

Motion refused,
without Costs.

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
AND
EXCHEQUER CHAMBER.

MICHAELMAS TERM, 60 GEO. III.

MEMORANDA:

IN the preceding Vacation, Sir *Robert Gifford*, Knight, His Majesty's Solicitor General, was appointed Attorney General, and

John Singleton Copley, one of His Majesty's Serjeants at Law, was promoted to be his Successor in the Office of Solicitor General, and was consequently knighted.

Robert Mathew Casberd, Esq. (having a Patent of Precedence, was appointed to succeed *Abel Moysey*, Esq. (who had resigned) as Justice of the Great Sessions for the several Counties of *Glamorgan, Brecon, and Radnor, S.W.*

1819.

Saturday,
6th Nov.

HODGSON and others v. MEREST and others.

The Court will not dissolve an injunction (obtained to stay proceedings in ejectment), on motion—in favor of persons claiming under a child otherwise provided for by his father's will, on whom the legal estate in customary-hold lands intended to be devised for life or in tail to another child by the same will (subject to questions of law as to the operation of the devise) has descended for want of being surrendered to the use of the will—against parties claiming under the latter as remainder-men or purchasers, notwithstanding the devisee have covenanted with the heir that he shall stand seized to the use of himself and his heirs and assigns in case of breach of covenants afterwards broken.

MARTIN and *Girdlestone* now moved to dissolve the injunction which had been granted to restrain the defendants from proceeding in an action of ejectment.

The bill on which the injunction was obtained set up a claim to certain *customary*-hold lands alleged to have been devised to the plaintiffs' ancestor, a younger son of the testator, for life, with remainder to his issue; but that for want of a surrender and conveyance to the uses of the will, the legal estate therein had descended to the ancestor of the defendants, the testator's customary heir, who had also been amply provided for otherwise by the same will.

The answer of the defendants insisted on covenants entered into by the plaintiffs' ancestor in a deed of conveyance for valuable consideration of a freehold estate devised to him by the will, with the ancestor of the defendant, which deed recited the intention of the testator to devise the said customary lands according to the limitations set forth in the plaintiffs' bill, and that for want of surrender they had descended as alleged. Those covenants were that the former would do certain acts to make the latter a perfect title, and that in case of eviction by the issue of the covenantor, the covenantee should stand seized of the said customary lands

to

to the use of himself and his heirs for ever: and it alleged breaches by plaintiffs and their ancestor.

Benyon, Shadwell, Spranger, and Mascall for the plaintiffs, opposed the motion, submitting, that the testator, by the will under which the plaintiffs claimed, having devised the customary lands in question to the plaintiffs' ancestor, the Court would declare the defendants trustees for the plaintiffs, and direct a surrender; or hold the defendants' ancestor bound by having made his election to take under the same will, thereby giving effect to the plaintiffs' claim *: and they contended, that the ejectment must be continued, as the Court ought not to change the possession on motion.

On the part of the defendants it was insisted, that if the plaintiffs' ancestor had originally any legal or equitable claim to entitle him to a decree in his favor, he had precluded and bound himself by his covenant.

They also relied upon the failure of the devise in point of law, inasmuch as the estate in question being customary-hold, and having been given to the plaintiffs' ancestor by a devise of all the testator's lands &c. at *Aulby*, (*part of which was freehold*, and part the customary-hold in ques-

* These important questions were very fully argued at the hearing; therefore the argument upon this occasion, when the Court did not give any opinion on those points, is omitted, being reserved for the report of the final determination of the Court when the judgment was pronounced.

1819.

HONGKON
and others
v.
MERRIST
and others.

1819.

HONGSOM
and othersv.
MERRETT
and others.

tion) it had operated only on the freehold, and the customary-hold had not passed, according to the doctrine established by all the decisions.

RICHARDS, Lord Chief Baron (stating the devises, the facts, and the circumstances of the family at the death of the testator). The testator, having both freehold and copyhold lands forming part of the estate devised, by name, to the plaintiffs' ancestor, or, at least, intended to be devised to him for life or in tail; the devise gave him a claim *prima facie*, in equity at least, to the whole. It appears that he afterwards entered into some arrangement respecting it, and whether a foolish one or not we cannot now consider; but the plaintiffs being remainder-men, are not affected by the contract of their ancestor, and are not bound to make good his engagement: at least there is no equitable act which the Court can call upon them to do, and therefore we cannot interfere, and certainly not in this summary way.

A question has been raised whether the customary-hold part of the estate passed at all under the will. It does not, however, appear that it did not pass in Equity at least, and that would be necessary to be clearly shewn, to warrant our dissolving this injunction. Then it is also clear that the child under whom the defendants claim, was provided for by the same instrument; and he is, therefore, within the rule of Equity, not entitled to the assistance of the Court. We are consequently compelled to stay the ejectment.

GRAHAM,

GRAHAM, *Baron*, of the same opinion.—The testator was the best judge of what was a proper provision for his several children. If the child under whom the defendants claim had not received any patrimony, this motion would have had a stronger claim to attention. As it is, the injunction must be continued till the hearing.

1819.

Hopson
and others
v.
MERRIST
and others.

Per Curiam.

Injunction continued.

GEORGE v. HOWARD,

Saturday,
6th Nov.

ROUPELL moved, on the part of the defendant, to vary the minutes of the decree which had been made in this cause at the Sittings after last *Trinity Term*, (a) by adding, after the words "navy 5*l. per cents* in the pleadings mentioned" the words "together with the dividends which have accrued due thereon."

Wrottesley opposed it, submitting that the minutes could not be varied by so important an addition, on motion to vary a decree so long pronounced, and that it could only be done, if at all, on a re-hearing.

Roupell, suggesting that the expence of a re-hearing, where the subject-matter was of so small

The Court will order the minutes of a decree, declaring stock "not to be part of the personal estate of an intestate," on a general claim by some of the next of kin, against a particular claim by others, to be varied, by adding the words "together with the dividends which have accrued due thereon;" on a special motion, without a re-hearing, where the amount is small, and the alteration is reasonable and consonant with the tenor of the original decree.

(a) Ante, page 646.

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 GEORGE
 v.
 HOWARD.

amount, added to the obvious propriety of the proposed alteration, which accorded with the principle of the decree, urged, that the practice in that respect was not so precise and inflexible as not to admit of its being done on special motion, if the circumstances of the case should warrant it.

RICHARDS, *Lord Chief Baron*.—If the evidence shall be found to warrant the proposed variation, which seems reasonable, the Court, I think, may do it. The Court, on a subsequent day, the Chief Baron having been in the mean time furnished with the evidence in the cause, made the order, as prayed.

Saturday,
 6th Nov.

BOYD v. STRAKER.

An affidavit of justification of bail, in the jurat of which it was stated to have been "sworn at Beverley," (omitting the county) rejected.

IT was objected by *Jones, D. F.* to the affidavit of justification of bail in a country cause, that it was stated in the jurat to have been "sworn at Beverley" only, omitting the county, on which he submitted that it could not be received.

The Court held the objection fatal, and rejected the affidavit on that ground.

JONES

1819.

JONES v. JONES and others.

Demurrer [Equity].

Monday,
8th Nov.

THE plaintiff, as heir at law of his deceased ancestor, filed this bill for the purpose of establishing his title to the inheritance against a will, alleged to have been procured to be made by fraud and collusion, and to be void, for various other reasons particularly charged by the bill:

Praying that the defendants might set forth a schedule of all papers &c. belonging to the deceased in their possession (the bill having charged that they had possessed themselves of, and withheld such papers, to prevent the plaintiff bringing ejectment, and that they threatened to set up outstanding terms &c.), and leave them in the hands of their clerk in Court—that the writing purporting to be a will might be set aside, and declared null and void as to the real estates of the deceased—and that he might be declared to have died intestate; and for an account &c., the appointment of a receiver &c., and an injunction to restrain the defendants from receiving any further rents and profits &c.

A Court of Equity will not entertain a bill by an heir at law for setting aside and declaring void an impeached will, alleged to have been procured to be made under circumstances of fraud charged, unless some obvious definite impediment, which the Court can see and reach, to proceeding at law by ejectment be shown by the bill to obstruct the plaintiff in that his regular course; and that although the bill charge generally that the defendants have possessed themselves of all the papers and muniments of the deceased, and threaten to set up outstanding terms.

To that bill the defendants put in general demurrers; for that the complainant had not by his bill stated any matter of Equity, whereon &c., and therefore &c.

Taxed costs are given in this Court on allowing a demurrer to the whole bill.

Martin and Barber, in support of the demurrer, contended, that the plaintiff could not pro-

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 JONES
 v.
 JONES
 and others.

ceed by bill in Equity to effect the objects of the prayer. If the facts stated by the bill were true, the plaintiff's remedy would be by ejectment, as a Court of Equity cannot decide on the validity of a will.* They observed that this experiment had been made before in the Court of Chancery, and failed there.†

Jervis and *Fisher* for the bill, insisted, that there were many parts of it which must be answered: and they contended, that the facts stated had furnished sufficient ground for the interference of a Court of Equity, at least so far as to direct an issue. They urged that it had been determined, that a Court of Equity can relieve an heir at law, in case of a will having been obtained by fraud, *Gosse and another v. Tracy* (a); and that although it might be good at law: same case in *P. Wms.* (b)—and *Welby v. Thornagh and Ur.* (c)—and where there are obstacles to prevent an ejectment, the Court will grant an issue so shaped as to get at the justice of the case, by not permitting any undue obstruction, *Pemberton v. Pemberton* (d); and will order a will rendered void by fraud to be delivered up, that it may not vex the heir's title.

The Court however determined, that the present bill could not be supported, giving, as the rea-

* *Pemberton v. Pemberton*, 13 Ves. 297.

† See *Jones v. Frost and others*, 3 Mad. 1.

(a) 5 Verh. 600.

(b) 1 P. Wms. 207.

(c) Pr. Ch. 123.

(d) 13 Ves. 200.

sons, that parties can only proceed in the way now attempted, where they cannot proceed at law, in consequence of some obvious defined impediment, which clearly stands in the way of the plaintiff's pursuing the regular and usual course of proceeding by ejectment, and which it is in the power of the Court to remove or restrain, as where the legal estate is out of the plaintiff in consequence of outstanding incumbrances, and other cases of that nature; but they cannot interfere on a general allegation, that the plaintiff cannot proceed by ejectment.

1819.
—
JONES
v.
JONES
and others.

In this case, said the Court, the real question is, whether the will, which is sought to be impeached, is valid or not? and that is a question which we cannot determine. Courts will sometimes grant perpetual injunctions after ejectments have been tried, and will interfere in other cases where the party requiring their interference, shews that it is necessary to his claim, and that the Court ought to interpose; but the plaintiff has not by this bill made out any such case. Some of the old decisions may imply a power in Courts of Equity to interfere in cases of wills procured to be made by fraud, but it is now well settled that they cannot. We must therefore allow this demurrer.

Per Curiam.

Demurrer allowed.

The defendant applying to the Court for costs beyond the usual allowance of 5/., which had
x x 4 been

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JONES

c.

JONES
and others.

been frequently granted of late in the Court of Chancery, they said, that in this Court the practice was always to give taxed costs on allowing a demurrer to the whole bill.

Tuesday,
16th Nov.

WARRINGTON, Clerk, v. MOTHERSILL and others,

N 340c. 430.


To a bill against an occupier for an account of tithes arising from farms and lands, situate within the township of K. in the parish of L., a plea that the defendant did not occupy any farm or lands within the parish of L. or the titheable places thereof, allowed.

BILL by the vicar of the parish church of *Leeke*, for an account of the small tithes arising from the defendants' farms and lands, situate within the township of *Kepewicks*, in the parish of *Leeke*, or the titheable places thereof, charging that the defendants were all living and residing in the parish of *Leeke* since *November*, 1814, and were in the occupation of farms and lands, situate within the township of *Kepewicks*, within the said vicarage or parish of *Leeke*, from which they had taken titheable matters &c.

Kidson, one of the defendants, by his answer stated, that he had paid the tithes by composition to an agent, appointed under a sequestration.

Mothersill and the other defendants pleaded severally the following plea in bar, as to the whole of the discovery and relief sought by the bill, that he was not in *November*, 1814, nor had he since, nor was he then in the possession or occupation of any farm or lands, which was or were situate, either wholly or in part, within the vicarage

vicarage or parish of *Leeke*, in the said bill mentioned, or the titheable places thereof, all which defendant averred to be true, and pleaded same in bar, humbly demanding &c.

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 WARRINGTON,
 Clerk,
 v.
 MOTHERSILL
 and others.

The plea having been set down for argument,

Spranger, in support of it, submitted, that although the present plea was negative in form, it had all the requisites of a good plea; and its effect was to bring the case to a single point, and obviate a suit; for which, if the plea shewed that there could be no foundation, which was the object and purpose of every plea in bar in Equity, it ought to be allowed,

Fonblanque and *Raithby* contended, that the plea being negative, denying what would be, if the denial were true, matter of defence to the bill, it could not be maintained as a plea. They submitted that perjury could not be assigned upon the affidavit verifying so *general* a negative, and that it would destroy the efficacy of most bills in Equity if defendants were allowed to get rid of them by a general negative plea, and were not to be put to a more particular denial of the facts negated, and of the collateral matter, by answer. It is stated in *Lord Redesdale's Treatise on Equity Pleading* (a), that "It has been made a question how far a negative plea can be good;" and he refers to the case of *Newman v. Wallis* (b), where

(a) Page 187, 3d edit.

(b) 2 Bro. C. C. 143.

Lord

1819.

 WARRINGTON,
 Clerk,
 v.
 MOTHERSILL
 and others.

Lord *Thurlow* determined that a plea in abatement that the plaintiff was not heir could not be supported; and although his Lordship is said to have disapproved of what he there held in a subsequent case, yet, when it is considered that in that latter case (*Hall and others v. Noyes and others* (a)) the question was, whether a plea, negating the plaintiff's right to a discovery, by denying the title on which the plaintiff proceeded, was good, Lord *Thurlow* merely observed, that in such a case the plaintiff's title might have been met by a plea; the present case, where the defendant denied this fact upon which *his own liability* was founded, was not touched by that *dictum*, but was within the principle, that a general negative could not be pleaded; but the facts must be denied by answer.*

Another objection was, that the plea denied the occupation of lands in the *titheable places* of the parish, which was matter of law.

The *Lord Chief Baron* was absent, sitting in Equity in the *Exchequer Chamber*.

GRAHAM, *Baron*.—It appears to me to be quite clear that this is a good plea; and whatever may have been formerly said of the invalidity of negative pleas, the more modern cases have established

* Vide *Dolder v. Lord Huntingfield*, 11 Ves. 283, and the cases cited; *Faulder v. Stuart*, 1b. 296; and *Shaw v. Ching*, 1b. 303.

(a) 3 Bro. C. C. 483.

lished their propriety; and I cannot conceive how it could have occurred to Lord *Thurlow's* mind, that a negative plea could not be maintained; and indeed it appears that he himself afterwards, on further consideration, held his doubt, which proceeded on technical grounds, to have been unfounded, and that where the plaintiff stated his title as a partner, and the partnership was denied, it was good matter of plea. This is in substance the same thing; and in both cases the object is to protect the party from an account which the plaintiff has clearly no right to demand, and which may be shewn, as here, by a direct averment completely answering the whole case, and therefore precluding all further inquiry as to any collateral matter, which if the plea were true, the defendant would not be bound to answer. Nor can the plaintiff sustain any inconvenience from allowing such a plea; for, on proving the defendants occupation of any lands in the parish, he would be entitled to the account, or he might have had an opportunity of examining him before the Master. I am therefore clearly of opinion that these pleas are good, and must be allowed.

Wood, *Baron*, of the same opinion.—I have no doubt that these pleas are good on the plain principle of all pleas in Equity; that if true, they operate to put an end to the suit at once, by the short mode of putting a single fact in issue, instead of going on at great and unnecessary length to answer a bill which has been filed without any foundation. The truth of the plea may
be

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WARRINGTON,
Clerk,
P.
MOTHERSILL
and others.

... in the year of the ...
... the plaintiff to ...
... the statutory judgment, which he ...
... in this cause, and the writ of ...
... thereupon, should not be set aside ...
... irregularity, with costs, and all proceedings ...
... the mean time stayed.

The affidavit stated that the action was commenced in Easter Term, and that the plaintiff delivered his declaration of that Term, to which the defendants pleaded—that in Trinity Term following the plaintiff delivered a replication to which the defendants demurred—that the demurrer was delivered on the 21st July, and that the declaration was not under terms.

The affidavit also stated that the plaintiff's attorney, who was called upon to answer, refused to answer.

fusing to accept it, and threatening, that unless the defendants immediately rejoined, judgment would be signed—that the defendants' attorney sent back the demurrer, giving notice, that if judgment should be signed, the Court would be moved to set it aside, but that notwithstanding the plaintiff treated the demurrer as a nullity, and signed judgment and executed a writ of inquiry.

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 LANGFORD
 v.
 WAGHORN
 and another.

= The declaration was in trespass for entering the plaintiff's apartments, and disturbing him therein, and taking away divers articles of his furniture. A second count for expelling the plaintiff, with a common count *de bonis asportatis*.

The defendants pleaded the general issue as to the first count; and as to the second, title to the dwelling-house in which &c., by seisin in defendant *Waghorn*, a demise by him to a third person, and a justification of defendant *Waghorn* thereupon, and of the other defendant, as his bailiff or servant.

The plaintiff replied—as to the second plea of the defendants as to said trespasses in the introductory part of that plea mentioned, and therein attempted to be justified—*precludi non; quia de injuria sua propria, absque tali causa* &c.

To that replication the defendants demurred; for that the plaintiff had thereby traversed *all* the several matters contained in the defendants last plea, whereas he ought to have traversed *one* single

1810.

LAWSON

v.

WASHBURN
and another.

single matter only, whereon a proper issue might have been joined.

Jones, D. F. shewed cause.—He submitted, that as the motion was founded upon an affidavit that the defendants were not under terms to plead *issuably*, yet, as that fact was denied by the affidavits on the part of the plaintiff, and the Court will not try it upon affidavits, it must therefore, for the present purpose, be taken that they were under such terms. The question then would be, whether the special demurrer was, in the present instance, within the meaning of an *issuable* plea? He admitted that a demurrer may be so, but then it ought to be a fair demurrer substantially applying itself to the validity of the action, and not founded on a mere technical objection to the pleadings. In *Gray v. Ashton*, (a) and *Berry v. Anderson*, (b) it is distinctly laid down, that the defendant cannot put in a special demurrer when he is under the terms of pleading *issuably*. So *Stonehouse v. Vowell*, (c) *Wright v. Russell*, (d) *Cuming v. Sharland*, (e) and *Bell v. Da Costa*, (f) where the Court held, that a defendant, who is under terms to plead *issuably*, is not at liberty to take advantage of any objections upon special demurrer, of which he could not have availed himself upon a general demurrer. Now here the objection to the replication is substantially this, that it puts in issue all the different material allegations of the plea, instead of taking issue

(a) 3 Burr. 1788.

(b) 7 T. R. 530.

(c) Sayer, 88.

(d) 2 Bla. 923.

(e) 1 East, 411.

(f) 2 Bos. & Pul. 446.

upon a single point. This objection can only be supported upon a special demurrer, *Collins v. Walker*, (a) and *Banks v. Parker*; (b) and here the defendant has demurred specially.

1849.

 LANGFORD
 v.
 WAGHORN
 and another.

Comyn, in support of the rule.—The distinction always is, in these cases, not between a special and a general demurrer, but between a real and fair demurrer, and a demurrer without good cause: *Dewey v. Sopp*, (c) *Nesbitt v. Farmer* (d). Now here the replication was substantially bad; it put in issue all the material allegations of the plea, and would have cast upon the defendant the necessity of proving them. Where a defendant insists upon a mere matter of *excuse*, the plaintiff may reply *de injuria*; but where the defendant by his plea insists on a *right*, such a replication cannot be supported: *Crogate's case*, (e) *Cowper v. Monke*, (f) *Cockerill v. Armstrong* (g). The demurrer therefore was a fair demurrer, and not without good cause; and it was in fact advised by counsel.

Per Curiam.

The demurrer was a fair demurrer, from which the defendant is not precluded by the terms of pleading issuably. The plea is not an excuse, but insists upon title; and the replication of *de injuria* cannot be supported. They therefore made the

Rule absolute.

(a) Sir T. Raym. 50.

(b) Hob. 76.

(c) 2 Stra. 1185.

(d) Barnes, 168,

(e) 8 Co. 67.

(f) Willes, 52.

(g) Ib. 99.

1819.

Thursday,
18th Nov.

SMITH v. BATTERSBY.

Production by plaintiff of a rule, obtained by defendant for payment of money into Court, and the Master's *allocatur* of a certain sum for costs is sufficient evidence of the plaintiff's election to take the sum paid into Court; and if he afterwards proceed for the costs taxed, and not paid, he need not prove a previous demand at the trial.

A nonsuit on that ground, set aside.

THIS cause was tried at the last Summer Assizes, at *Lancaster*, before Mr. Justice *Bailey*. The plaintiff on the trial merely gave in evidence a rule obtained by the defendant, for payment of money into Court, and the Master's *allocatur* of a certain sum for costs in pursuance of that rule. The learned Judge thought that evidence insufficient, and nonsuited the plaintiff, with liberty, however, to move to enter a verdict with nominal damages. A rule *nisi* having been obtained early in this Term to set aside the nonsuit, and enter a verdict accordingly;

Jones, D. F. now shewed cause, submitting, that the evidence upon the trial was insufficient. The rule for payment of money into Court was, at the instance, and in favour of the defendant; and the plaintiff might still have proceeded, if he had chosen to take the chance of recovering a sum beyond the amount paid in by the defendant. There was nothing in the evidence upon the trial to shew that the plaintiff accepted the money paid into Court, instead of proceeding for an ulterior sum. It was not proved that the plaintiff ever served any notice to attend the taxation of costs, or that the defendant in fact ever attended such taxation. The *allocatur* only shews the
Master's

Master's judgment respecting the amount of costs, but that might have been upon an *ex parte* taxation.

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[The Court here inquired whether, according to their practice, the taxation of costs under these circumstances ever took place *ex parte*, without the attendance of the defendant or his attorney, and without any notice to attend: and the Master certified that such taxation never took place without the attendance of the defendant's attorney, or proof of notice to him.]

It was then contended, that where the defendant's attorney had not attended, proof before the Master, to his satisfaction, was not sufficient, but regular proof should have been given at the trial. At all events there should have been a demand of the costs, in order to apprise the defendant that the plaintiff was proceeding in the action to recover the costs: and here there was no proof of any demand.

Starkie, in support of the rule, contended that the evidence given was sufficient. By the practice, as certified by the Master, the taxation could not have been *ex parte*, and without notice. Either the defendant's attorney attended, or he must have had notice to attend, of which the *allocatur* itself, coupled with the known practice of the Court, is sufficient proof: and therefore no demand was necessary. The taxation of the costs by the plaintiff shews his election to accept the

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money paid into Court, with the costs up to that time. In the case of *Smith v. Smith (a)*, the Court of *Common Pleas* held, that if a defendant pay a sum of money into Court, and obtain an order to stay proceedings, on payment of that sum and costs, and omit to pay the costs when taxed, the plaintiff, after taking the money out of Court, may proceed without a previous demand of the costs.

Per Curiam. The case of *Smith v. Smith* is an express authority in point, and appears to us to have been well decided. The proceeding to tax costs was a sufficient notice that the plaintiff elected to accept the sum paid into Court, and no demand was necessary.

Rule absolute.

(a) 2 Bos. & Pul. N. R. 473.

WEAK,

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WEAK, on the Demise of BURGE and Another v.
CALLAWAY and Others.

Tuesday,
23d Nov.

ON the trial of this ejectment, the *lessors of the plaintiff* failed in proving their case; because, when they had shewn (it being necessary for them to prove that their grand-father had been married) that he was married to a woman of the name of *Joanna Forrest*, the defendants proved that *Joanna Forrest* had been married to another person. They afterwards discovered, by the register, which they had not been able to find before the trial, that the grand-father had been married to *Ann Forrest*, and upon that they moved for and obtained a rule to shew cause why there should not be a new trial, on an affidavit stating the above facts, and that if a new trial were not granted, the lessors of the plaintiff would be obliged to make an entry to avoid a fine intended to be levied.

The Court will in some cases grant a new trial of an ejectment, where a verdict has been found for the defendant—as where the lessors of the plaintiff have, since the trial, discovered that they had conclusive evidence of a material fact (the marriage of their ancestor) which they failed to prove at the trial, in consequence of mistaking the christian name of the person to whom the ancestor had been married, and where it is expected that they may be obliged to enter to avoid a fine intended to be levied before a new ejectment can be brought.

Gaselee and *Casberd*, now shewed cause. They submitted, that where a verdict had been found for the plaintiff, the Courts would grant a new trial, but not where the verdict was found for the defendant; *Dobbs v. Passer (a)*, Lessee of *Clymer v. Littler (b)*, *Letgoe*, d. *Wheeler v. Pitt (c)*, and that there was no instance where, in a case like

But they will only do so on terms of the costs of the former trial, and the application for the new trial being first paid.

(a) 2 Stra. 975.

(b) 1 Bl. 348.

(c) Barnes, 439.

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WEAK,
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the present, the application had been granted on behalf of a *plaintiff*. The principle of the rule is, that the Courts will not change the possession, and the plaintiff is not concluded.

Pell, Serjt., *C. F. Williams*, and *W. Adam*, supported the rule.

The Court, saying that this was a case in which the making absolute the rule which had been granted for a new trial, could not operate to the injury of the defendant, and might assist the justice of the case, under the circumstances, made the

Rule absolute — for a new trial, on payment of the costs of the preceding trial, and of the present application.

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IN THE EXCHEQUER CHAMBER.

Coram RICHARDS, LORD CHIEF BARON.In the Matter of MARY and ANN JANAWAY,
Infants.Tuesday,
23d Nov.

IT was referred to the Deputy Remembrancer by order of the Court made on a petition for the purpose of compelling a surrender of copyhold premises by an infant heir, to a purchaser of his ancestor, to inquire and report whether *Mary* and *Ann Janaway* were infants, and if so, whether they were trustees within the 7 Ann. ch. 19.

The Court refused to direct an infant customary heir to surrender copyhold premises to a purchaser, which had been sold and conveyed to him by the deceased ancestor of the infant, for valuable consideration, and for which the ancestor had received the purchase money in his lifetime, on a motion made to confirm a report, which found those facts, and that the infant was a trustee within the 7th of Ann. on the ground that it was an *ex parte* proceeding, and *non constat* that the ancestor was competent to sell; and therefore the Court would not declare the infant a trustee within the statute.

The Deputy Remembrancer thereupon reported as follows:—That *Mary Harris*, spinster, being seised or possessed to her and her heirs, according to the custom of the manor of *Chertsey Bepmand, Surrey*, of (*inter alia*) the hereditaments hereinafter mentioned held of the said manor, by her will, bearing date the 14th of *December, 1788*, gave and devised unto her nephew *James Janaway*, son of her sister *Ann Janaway*, and to his heirs and assigns, for ever, (*inter alia*) all and singular the said premises, subject to the payment of two annuities in the said will given by the said *Mary Harris* to her sisters *Ann Janaway* and *Elizabeth Gubbings*, for their respective lives;—that at a general Court Baron,

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held the 26th of *January*, 1790, for the said manor of *Chertsey Beomand*, presented, that the said *Mary Harris* died seised to her and her heirs of and in the said hereditaments, held of the said manor, and that having duly surrendered the same to the use of her said will, he, the said *James Janaway* thereupon came into Court, and was admitted to (*inter alia*) all the said premises, to hold to him, his heirs and assigns, for ever, (subject to the payment of the said annuities) at the will of the lords of the said manor, according to the custom thereof. That at another Court Baron, held the 24th of *January*, 1809, for the said manor, the homage presented a certain surrender taken out of Court, (to wit) on the 6th day of *September*, 1808, whereby the said *James Janaway* surrendered the aforesaid premises, with their appurtenances, whereto he was so admitted tenant at the aforesaid Court Baron, on the 26th of *January*, 1790, to the use and behoof of *Abraham Holden Turner*; and (stating a mortgage to him) that the annuitants were both since dead; and that by an indenture tripartite, dated the 6th of *February*, 1811, made between the said *James Janaway* of the first part, the mortgagee of the second part, and *Mary Tippet* of the third part—(after reciting the title of *Janaway* to the premises, and the mortgage surrender, and that the said *Mary Tippet* had contracted with the said *James Janaway* for the sale to her of the said pieces of land, at the sum of 426*l.*, and that the whole of the said mortgage debt, and some interest still remained due and owing, and that the mortgagee, being

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being satisfied with the security of the other premises, did, upon the request, and for the accommodation of him, the said *James Janaway*, thereby consent to his receiving from the said *Mary Tippet* the whole of her said purchase money of 426*l.*, and did further agree to receive the said lands sold to her from his said mortgage)—it was witnessed that in consideration of five shillings to the said *Abraham Holden Turner*, in hand, paid by the said *Mary Tippet*, he (the mortgagee) did remise, release, and for ever quit claim to the said *Mary Tippet*, her heirs and assigns, so much and such part of the said lands and hereditaments, thereinbefore mentioned to have been sold by the said *James Janaway* to the said *Mary Tippet*, her heirs and assigns, as aforesaid: to the intent that the same lands and hereditaments so agreed to be sold to the said *Mary Tippet*, her heirs and assigns, might be wholly and absolutely exonerated and discharged from the said mortgage so surrendered, and the principal and interest monies thereby secured, and all claims and demands in respect thereof. And it was by the said indenture further witnessed, that in consideration of 426*l.* paid by the said *Mary Tippet* to the said *James Janaway*, he did (&c.) covenant, promise, and agree with and to the said *Mary Tippet*, her heirs, executors, administrators and assigns, that he, the said *James Janaway*, his heirs, executors, administrators and assigns, should and would, at the then next general Court Baron to be holden in and for the said manor, in due form of law, surrender the last thereinbefore stated premises, with their appurtenances

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purtenances thereinbefore mentioned, and described to be sold as aforesaid: *and which deed was duly executed* by the said *James Janaway* and the mortgagee, with a receipt for the consideration, indorsed.

And the Deputy Remembrancer also found, that upon the execution of the said indenture of the 6th of *February*, 1811, the said *Mary Tippet* entered on the said copyhold hereditaments comprised therein and continued in the possession thereof as owner until the time of her decease: and that the said *James Janaway* departed this life intestate in or about the 3d day of *October*, 1818, having had only three children, one of whom died an infant at the age of three months, or thereabouts; and that the said *Mary Janaway* and *Ann Janaway*, which said *Mary Janaway* and *Ann Janaway* survived him, and then were his, the said *James Janaway*'s co-heiresses at law, according to the custom of the said manor of *Chertsey Beomand*.—That the said *Mary Tippet*, by her will, dated the 10th of *July*, 1814, duly executed as by law required to pass real estates of inheritance, gave and devised (*inter alia*) unto her son *William Henry Tippet*, the premises in question, to hold to him, his heirs and assigns, for ever. And he found that the said *Mary Tippet* died in *June*, 1814: and that the said *James Janaway* never having surrendered the copyhold hereditaments comprised in the said indenture of the 6th of *February*, 1811, to the use of the said *Mary Tippet*, her heirs and assigns, was, at his death, a trustee of the same for the said *Mary Tippet*, her heirs
and

and assigns; and that the said *Mary Janaway* and *Ann Janaway*, as his co-heiresses at law, were then co-trustees of the same for the said *William Henry Tippet*. And that the said *Mary Janaway* attained her age of twenty-one years, in the month of *June* last; but that the said *Ann Janaway* was still an infant, viz. of the age of sixteen years, or thereabouts; and that therefore the said *Ann Janaway* was such co-trustee as aforesaid, within the statute of the 7th year of *Ann*.

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Beames now moved to confirm the report, and that the infant trustee might be directed to convey accordingly.

He submitted, that although this precise question had never been expressly ruled, the authorities, as far as they went, were all in favor of the object of the petitioner: and in *Watkins on Copyholds* (a), cases are cited to shew that copyholds are within the statute.

In the special case drawn up for the opinion of the Court of *King's Bench*, in *Doe, d. Harman, v. Morgan* (b), on a question of the descent of a copyhold estate, it is expressly stated, that the infant customary heir of his ancestor (to whom the tenant in fee had mortgaged and surrendered the premises, and which had descended on the infant who had been admitted tenant), had, by virtue of an order of the Court of Chancery (the

(a) Vol. ii. p. 63. 191.

(b) 7 T. R. 104.
 mortgage

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mortgage money and interest having been paid to the mortgagor's executor), *surrendered the premises into the hands of the lord, to the use of the mortgagor*. It was also held, in an anonymous case in *Comyns's Reports* (a), that an infant *fême covert*, being a trustee, might be ordered to levy a fine under the statute. In *Ex parte Smith* (b), and *Ex parte Johnson* (c), the Court of Chancery directed the infants to convey by recovery; and in *Ex parte Anderson* (d), the Master of the Rolls, on the authority of Lord Thurlow, who there professed to act on former decisions, directed an infant to convey an estate in *Calcutta*; and in those two last cases the orders were founded on the *generality* of the statute. In *Evelyn v. Forster*, the Lord Chancellor, being referred to *Ex parte Anderson*, agreed (although he refused *on motion* to grant an order, that an infant mortgagee, on the mortgagor's paying the money into Court, should reconvey lands in *Ireland*) that there would have been no objection to it *on petition*. So also in ——— v. *Hancock* (e), an infant trustee was held to be within the statute, notwithstanding he had an interest as co-executor and co-residuary legatee; and in *Ex parte Bellamy* (f), an infant mortgagee was held to be within the statute, whether he were beneficially interested in the mortgage money or not; and in all those latter cases, the Court proceeded on the principle that the statute, being remedial, ought to be construed extensively and liberally.

(a) Com. Rep. 615.

(b) Ambl. 624.

(c) 3 Atk. 559.

(d) 5 Ves. 240.

(e) 17 Ves. 383.

(f) 2 Cox, 422.

There are also cases where a constructive trustee has been held to be within the statute, as in *Holeworth v. Lane* (a), where (a case of *Bertie v. Vernon*, having been cited as establishing that the heir of a vendee was held to be within the act a trustee for a person who had paid the purchase money), it was determined, that the heir was a trustee for the executor of a mortgagee. He also cited a MS. case of *Ex parte Vernon* (b), taken from

(a) Moseley, 197.

(b) 2 P. W. 549. That case, as cited at length upon the present occasion, is as follows:—

[Copied from the Register's Book, made by Mr. Bedwell, entering Register. Reg. Lib. 8. 1728, fol. 423.]

JANE VERNON, *Ex parte*.

‘ WHEREAS by an order of the 6th of June last, it was referred to Mr. Thomas Bennett, one of the Masters of this Court, to examine and certify whether Henry Ellingham, the infant in the said order mentioned, was not a trustee of the premises in the said order likewise mentioned, within the intent and meaning of the statute of the 7th year of the reign of the late Queen Anne, entitled, “ An act to enable infants who are seised of estates in fee in trust, or by way of mortgage, to make conveyances of such estates.” Now, upon motion this day made into this Court by Mr. Williams, of counsel with the said Jane Vernon, it was alledged, that in pursuance of the said order, the said Master made his report, dated the 18th day of June last, and hath certified, that by indentures of lease and release, dated the 18th and 19th days of September, 9 Ann. nup. Reginae, 1710, made between Miles Frearson, of London, Clothworker, of the one part, and W. Monk, citizen and draper, of London, of the other part, the said Miles Frearson, in consideration of 70*l.* to him paid, did grant, release, and convey to the said W. Monk and his heirs, all the messuages or tenements, with the appurtenances, in Whitchurch, in the county of Southampton, in Church-street, then or late

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to the devisee of the real purchaser, as being the *cestui que trust*.

Upon those authorities, added to the equity of the case, where the ancestor had actually received the money, and conveyed, as far as he could convey, the inheritance of copyhold premises, he submitted that the present was a case fairly within the purview of the act, and the principle of all the authorities.

RICHARDS, *Lord Chief Baron*. This is quite a clear case upon the face of it, in my view of the facts. In the case of a mortgagee and the

ham had sworn; and particularly that the said estate was let for no more than 40s. *per annum*, and that the said *Joseph Lee* was servant and book-keeper to the said *Thomas Vernon*, for several years; and that the said *Thomas Vernon* did often make use of the name of the said *Joseph Lee*, as a trustee for him in deeds, and other writings. And the said Master did further certify, that he found that the said *Thomas Vernon*, by his last will in writing, dated the 26th of June, 1723, proved, as well in this Court, as in the Spiritual Court, devised all his real estate unto his wife, the said *Jane Vernon* and her heirs, so that upon the whole matter, the said Master conceived the said infant, *Henry Ellingham*, had no interest in the premises, save only in trust for the said *Thomas Vernon*, and, as the said Master conceived, was within the intent and meaning of the said act of Parliament of the 7th year of the late Queen *Anne*, and that he ought to convey the said premises to the said *Jane Vernon* and her heirs, as being the devisee of the real estate of the said *Thomas Vernon*, deceased. It was therefore prayed, that the said *Henry Ellingham*, the infant, may convey the said premises to the said *Jane Vernon*, pursuant to the said act of Parliament and the said Master's report, which this Court, on hearing of Mr. *Weldon*, of counsel for the said infant, held reasonable, and did order the same accordingly.

executors

heir of a nominal vendee in trust being reported to be within the statute, might be ordered to convey to

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of the said premises, and that the 70*l.* was the real consideration made good to the said *Joseph Lee* for the said purchase; and that no part of the said 70*l.*, or other money whatsoever, was paid by the said *Henry Ellingham* to the said *Joseph Lee*, for the said premises, or any part thereof; and that he believed the name of the said *Henry Ellingham* was made use of in the said conveyance, in trust for the said *Thomas Vernon*; and that the said conveyance so made by the said *Joseph Lee* and his wife to the said *Henry Ellingham* as aforesaid, was, by the direction and nomination of the said *Thomas Vernon*. And he also found, that *William Ellingham*, the uncle, and *Arthur Ellingham*, the great uncle of the said *Henry Ellingham*, the infant, by their affidavit, swore, that the said *Henry Ellingham*, the infant's father, died about September, 1725, leaving the said *Henry Ellingham* his eldest son and heir, who was an infant, about the age of six years; and that they believed, that the name of the said *Henry Ellingham* (the father) being the said *Thomas Vernon*'s particular acquaintance, and for many years employed by him as his packer in his trade to *Turkey*; and that the said *Henry Ellingham*, the father, never paid any money, or any other consideration, for the purchase of the said premises, nor ever was in possession, or received any rent for the same to his own use; but that the said *Thomas Vernon* was in possession thereof to the time of his death, and kept the deeds relating to the same; and that the said *William Ellingham* particularly said, that he had heard his said brother, *Henry Ellingham* (the father) declare, in his life-time, that he was only a trustee for the said *Thomas Vernon*: and that the said *William Ellingham* further swore, that after the death of the said *Henry Ellingham*, his brother, the said *Thomas Vernon* proposed that the said tenement should be conveyed to him, the said *William Ellingham*, as a trustee for the said *Thomas Vernon*, in the same manner as the said *Henry Ellingham*, the father, was before a trustee for the said *Thomas Vernon*, in relation to the said messuage, to which he the said *William Ellingham* consented, but nothing was done in regard the said *Thomas Vernon* died soon after. And the said Master found, that one *John Hunt* had, by his affidavit, sworn much to the same effect as the said *Joseph Lee* and *William Ellingham*.

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thinks proper. I shall not make the order most certainly.

This, it must be considered, is always necessarily an *ex parte* proceeding, and if a conveyance were made by an infant even under the order of the Court, it would not be valid if he were not within the act of parliament.

These things, I am sorry to observe, pass too often entirely *sub silentio*.

Friday,
26th Nov.

HARRISON v. BARRY, Esq. Sheriff of *Cheshire*.

In an action against the sheriff for removing goods taken in execution, without paying the landlord a year's rent, it is not necessary to prove that a year's rent is due. It is sufficient to prove the occupation by the tenant.

It lies on the defendant to shew that the rent has all been paid.

THE declaration stated that one *Thomas Shawcross* held and occupied a certain farm and premises in the parish of *Cheadle*, in the county of *Chester*, at the yearly rent of 440*l.*—that on the 1st *May*, 1819, a large sum of money, to wit, 880*l.* for two years rent had become due, and was owing from *Shawcross* to the plaintiff—that the defendant, as sheriff of *Cheshire*, on the 17th *May*, 1819, by virtue of a writ of *fieri facias* issued at the suit of *James Wright*, upon a judgment obtained by him against *Shawcross*, seized

Such a claim may be supported for forehand rent, or rent stipulated by the lease to be paid in advance, as being rent *due within the statute of Anne*; and such rent may be distrained for by the landlord, although he is aware that an execution is about to be set down at the suit of a judgment creditor.

If a landlord, who has distrained for rent, does not sell within the five days by arrangement between him and the tenant, that is no proof *per se* of collusion.

The Jury having found a verdict for the defendant under circumstances affording ground for the objections so over-ruled in this case, the Court ordered a new trial.

seized and took divers cattle, goods, and chattels of *Shawcross* upon the premises—that afterwards, but before the removal of the goods and chattels seized, the plaintiff gave notice to the defendant of the said rent due to him from *Shawcross*, yet that the said defendant contriving &c., removed the said cattle off the premises, without paying or satisfying to the said plaintiff his rent or any part thereof, contrary to the statute &c.

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 &
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The second count stated that *Shawcross*, for a long time, to wit, three years, had held and enjoyed a certain farm and premises in the said parish of *Cheadle*, by virtue of a demise thereof, at the yearly rent of 440*l.*; and that on &c. a large sum of money, to wit, 880*l.* of the said rent being due and in arrear from *Shawcross* to the plaintiff, the said plaintiff, according to the form of the statute &c., had seized and taken divers goods and chattels (enumerating them) then being in and upon the premises, as for and in the name of a distress, for the said rent in arrear; and that whilst the said goods and chattels were in the possession of the bailiff of the plaintiff, and in and upon the premises, the defendant contriving &c., rescued, seized, took, and carried away, the said goods and chattels, contrary to the form of the statute &c., whereby the plaintiff was deprived of the means of obtaining satisfaction of his rent, and of the costs and charges of the distress. The third count was in trover. The plea was the general issue.

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The cause was tried at the *Chester Summer Assizes*, 1819, before *Warren*, Ch. J. and *Marshall*, J. The evidence given on the trial was of very considerable length; but the only facts material to the points of law, which were ultimately raised, were these:—The plaintiff proved a demise of the farm in question to *Shawcross*, and contented himself with shewing the occupation by *Shawcross*, without giving any explanation of the state of accounts between *Shawcross* and him, and declined calling *Shawcross* to state whether any and what rent was in arrear, although he was in Court. It was admitted that part of the rent claimed was a forehand rent. It further appeared that the plaintiff was aware of the judgment having been obtained against the tenant, and that execution was about to be sent down against *Shawcross*—that he distrained a few days before the *fieri facias* could be sued out according to the practice of the Court—that he did not sell at the end of five days, but obtained from the tenant a consent to extend the time for selling for an indefinite period, and that he left the distress with the tenant's wife for the purpose of her keeping nominal possession, there were other circumstances of suspicion. Objections were made in point of law by the defendant's counsel, which were over-ruled by the Court. They were principally those which were afterwards discussed on the motion for the new trial. The case then went to the Jury, and the two following questions of fact were left to them. First, whether they were satisfied that the rent was justly due from *Shawcross*

cross to the plaintiff? Secondly, whether the possession under the distress was *bond fide*, or whether it was colourable and collusive, and for the purpose of delaying creditors? The Jury found a general verdict for the defendant.

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Evans, W. D. early in this Term, moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted. He insisted that the verdict was contrary to all the weight of evidence in the cause—and that the plaintiff having shewn the demise by him, and the occupation by *Shawcross*, it lay upon the defendant to prove that the rent was paid, in the absence of evidence of which the inference was, that it still remained due.

With respect to the forehand rent, he contended, that it might as well be distrained for as rent in respect of a by-gone occupation. As to the possession, he urged, that there was by no means sufficient evidence to support the conclusion that it was fraudulent: that though the landlord continuing in possession after the five days without selling, was *prima facie* a trespasser, as was held in *Winterbourne v. Morgan (a)*, yet that it was competent to the tenant to consent to an enlargement of the time, which consent was valid, not only as against the tenant, but also as against any party claiming under him, or under any execution against his property. A rule having been obtained,

(a) 11 East, 395.

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Jones, D. F. and Law, W. J. now shewed cause. They contended, that the two questions of fact were properly left to the Jury, and being decided by them, there was no reason to disturb the verdict. It was consistent with the evidence given in the cause, that every shilling of the rent might have been paid; for no explanation was given of the state of the accounts between the landlord and the tenant; and it is observable that *Shawcross*, the tenant, was in Court; but the plaintiff did not venture to call him. It is true, that where an action is brought by a landlord against a tenant after proof of a demise and of occupation under it, the burthen is cast upon the tenant of discharging himself by proving the payment of rent; the reason of which is, that the tenant, if he has paid, must be expected either to have witnesses to prove the fact of payment, or a written receipt to shew it. But the same rule ought not to hold in an action between the landlord and a third person, who is not privy to the transactions between the landlord and the tenant, and has no means of knowing what payments were made, what witnesses were present, or what receipts were given. It is not too much to expect that as against a *bond fide* creditor, enforcing his execution, the landlord should give reasonable evidence of rent being due, and not cast the proof of the negative upon a stranger. As to the question of fraudulent possession, that was peculiarly a question for the Jury.

Secondly,

Secondly, the distress at all events could not be maintained in respect of the forehand rent. The general rule is, that a landlord cannot distrain till after the efflux of the time, in respect of which the rent arises. It is true, that it was held in the case of *Buckley v. Taylor* (a), that the landlord might, under certain circumstances, distrain for forehand rent; but that case has been considerably shaken by that of *Lee v. Lopez* (b). Supposing however that case to have been well decided, the Court there proceeded on the ground of a peculiar custom of the country; whereas, in the present case, no such custom was either proved or pretended. But further, even supposing that a distress might be maintained for a forehand rent, as between landlord and the tenant, it remains to be shewn that such a distress can be maintained as against a third person, being a judgment creditor. The extraordinary remedy by distress is given to the landlord in respect of the actual occupation by the tenant and perception of the profits of the land. But the landlord's right to anticipate the rent cannot be superior or even equal to the right of a creditor to enforce his execution upon a judgment already recovered. If a landlord and tenant may thus stipulate for an anticipation of rent for half a year, they may equally do so for a whole year, or for five or any indefinite number of years; and thus by a collusive understanding between them, the claims of creditors may not only be delayed but defeated.

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(a) 2 T. R. 600.

(b) 15 East, 230.

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The plaintiff therefore ought not to recover upon the count which is founded upon the distress. Then as to the count which proceeds upon the statute 8 *Anne*, c. 14. the plaintiffs claim cannot be supported upon that; for here he had distrained before the execution, and when the execution came in, he claimed under the distress. The sheriff was not bound to provide for his rent, for which he was pursuing and insisting upon a remedy, distinct from and in opposition to the execution. But further, in order to charge the sheriff under the statute of *Anne*, there must be notice from the landlord to the sheriff, and also a demand, *Waring v. Dewberry*, (a) *Palgrave v. Wyndham*, (b) *Henchett v. Kimpson*, (c) *Smith v. Russell* (d); and here there was no sufficient evidence of any notice or demand. Lastly, the count in trover cannot be maintained. A landlord who has distrained goods cannot maintain trover for them; for he had at common law only a power to detain the goods as a pledge; and although by statute he is authorized to sell, yet he has not any property in them: *Moneux v. Goreham* (e).

Evans, W. D., in support of the rule, was stopped by the Court.

The Lord Chief Baron was sitting in Equity in the *Exchequer Chamber*.

GRAHAM, *Baron*.—I confess, it seems to me,

(a) 1 *Str.* 97.

(b) *Ibid.* 212.

(c) 2 *Wils.* 140.

(d) 3 *Taunt.* 400.

(e) 2 *Selw. N. P.* 1271.

(2d edit.)

that this case ought to be sent down to be reconsidered upon a second trial. It has been contended, that the landlord should have shewn the state of accounts between him and his tenant; but I cannot think so. He proved the demise and the occupation; and the defendant should have shewn that the rent had all been paid. Occupation is *prima facie* evidence against a tenant generally; and I do not see why it should not be so equally against this defendant. Then, as to the objection respecting forehand rent, I see no reason why it was not competent to include that in the distress. The anticipation of rent was a matter of express stipulation in the deed: it is admitted by the defendant's counsel, that an action of *debt* or *covenant* might have been maintained for such forehand rent against the *tenant*; and it seems to me that the remedy by *distress* may equally be supported in respect of it, either as against the *tenant* or as against the *judgment creditor*, who makes title under an execution against the tenant's effects. Then, as to the possession under the distress being collusive, without at all wishing to prejudge the question upon the second trial, I cannot help saying, that I am not able at present to see from what circumstances the Jury drew the conclusion which they formed. There is, at least, sufficient in the case to call upon us to send it down to be reviewed. This being my opinion respecting the count founded upon the distress, it becomes unnecessary to decide the objections that have been raised upon the other counts of the declaration.

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WOOD, *Baron*.—I agree with my Brother *Graham* that there ought to be a new trial; and in thinking so I proceed entirely upon the count which is founded upon the distress. It is contended, that the landlord should not only have shewn the demise and the occupation, but also the arrear of rent. But this was not necessary; and it would be a great hardship upon landlords if it were. The defendant might have called the tenant if he chose. Then, it is said, that the distress was suspicious; for that the landlord knew that the execution was coming, and sent in the distress just in time to be before the execution. If the landlord knew that there was an execution coming, he did very right to secure himself. But then again it is objected, that he could not distrain for forehand rent. If this objection, which is now raised for the first time, could be sustained, it would make a very serious change in the rights of landlords in general. Such a right of distraining was probably one of the principal objects for introducing that provision into the deed; it is a very proper provision to be introduced; and it would be very unjust if the landlord could not enforce it either against the tenant, or against any one else.

GARROW, *Baron*, concurred—saying, that he thought the verdict ought to have been for the plaintiff.

Rule absolute for a new trial,
upon payment of costs.

RICKETTS

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Saturday,
27th Nov.

WILDE, on the 10th *November*, had obtained a rule, calling on the plaintiffs to shew cause why the bail-bond given in this cause should not be delivered up to be cancelled: and that in the mean time all proceedings should be stayed.

G. being a party in a suit referred to arbitration, having been also required to attend at *Exeter* as a witness before the arbitrator, and to bring with him certain papers in his possession, to be read on the reference, which was appointed for the 20th *September*, left *London* on the 16th, for the purpose of going thither, and pursued his journey by way of *Clifton*, in order to procure the necessary papers which had been left there during a previous visit, in custody of his wife, who had continued and was still remaining there, and arriving on the 17th, employed himself in assorting his papers, and selecting such as were necessary to take with him,

The affidavit of the defendant, on which the rule was granted, stated in substance, that the deponent had filed a bill in Chancery against two persons, claiming certain property in their possession, and that the suit was referred by the Vice-Chancellor, by an order of the 16th *March* last, to an arbitrator, residing at *Plymouth Dock*, who was to make his award on or before the 1st of *June* then next, with power to enlarge the time till not exceeding the 1st *January* next. Witnesses were to be examined by the arbitrator, and the parties were to produce before him all deeds, writings, books, &c. in their possession—that the arbitrator enlarged the time for making his award till some day subsequent to the 20th *September* last. The deponent further swore that he had been for some time past resident at *Bristol*, and having left that city for *London* in *August* last, he had caused

to

which occupied him, and the professional person whom he had procured to accompany him to assist in so doing, all that day, and the next; and at five o'clock of the latter day, and whilst he was so busied, he was arrested at the suit of a creditor: Held, that he was privileged during the journey, including his stay at *Clifton*, on the ground of the deviation being for a necessary purpose, and the delay no more than reasonable for the accomplishment of it, according to the facts stated to the Court by the affidavits.—*Garrow, Baron, dissentiente; absente Richards, Lord Chief Baron.*

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to be packed up the whole of the papers and documents relating to the said suit, together with various others, all of which were left in the care of the defendant's wife, who afterwards went on a visit to *Clifton*, taking the whole of such papers with her: and the deponent stated that late on the evening of the 14th *September*, whilst resident in *London*, he was personally served with an order of the arbitrator to attend the reference at the hotel in *Exeter*, on the 20th, at twelve o'clock at noon—that the deponent left *London* to attend such appointment on the night of the 16th of *September*, accompanied by a professional person to assist him—that many papers and documents relating to the matter of the arbitration, and necessary to be produced in evidence, being then amongst those left at *Clifton*, it became necessary to take that place in his way to *Exeter*—that they arrived at *Clifton* in the evening of the 17th; and that they were busily occupied during a part of that evening, and nearly the whole of the following day in unpacking, perusing, examining, separating, and arranging the said papers &c.; and that whilst they were so employed, about five o'clock in the afternoon the deponent was arrested at the suit of the plaintiffs in this action, and that the sheriff's officer, notwithstanding the defendant shewed him the order of the arbitrator, and claimed to be discharged, would not release him till he had given bail. The affidavit also added, that the papers &c. were necessary to the matter of the reference, and that *Clifton* is distant from *Bristol*, through which the

the *London* and *Exeter* mail passes, only one mile; and that the deponent went there with the professional person alluded to, for the sole purpose of procuring such papers, and that on the following day (the 19th), the deponent having given bail, they pursued their journey to *Exeter* to attend the reference.

The affidavit of the person who accompanied him corroborated that of the defendant.

Jones, D. F. and *Platt*, now shewed cause against the rule, upon an affidavit made by the sheriff's officer, who made the arrest, stating, that he had been employed to arrest the defendant, and endeavoured to do so during the month of *August*, and until the 18th of *September*, but could not meet with him before; although he knew he was dwelling in the parish of *St. Mary Radcliffe*, in the city of *Bristol*: and that he had been informed and believed that the defendant had lodgings, or was residing or attending in the day time at *Clifton*.

Upon these facts they submitted that this was a case of unwarranted deviation and unnecessary delay on the part of the defendant in performing the journey. It did not appear that there was any necessity for his being personally at *Clifton* to procure the papers in question: his wife was there at the time, and might have sent him what he wanted; and he must have known what those were. But, admitting he had a right to go to
Clifton

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Clifton for his papers, he had no right to cover a stay of two days there under pretext of his privilege; if he had, he might by swearing that twenty days were necessary, have procured protection for that or any longer period which might suit his convenience: and if he were allowed to go to *Clifton*, which is admitted to be out of the road, he must be protected if he should go for the same purpose to any other part of the kingdom; for it would be impossible to draw a line.

Having cited an anonymous case from *Smith's N. P. Rep. (a)*, determining that a witness who lived twelve miles from the place of trial was not protected by his *subpœna* till twelve o'clock the next day, they adverted to the decision of the Court of *King's Bench* only two days before in a case of *Randall v. Gurney (b)*, wherein this same defendant had made a similar application upon similar grounds; and the Court held, that he was not protected, on the ground that even if he had made out a case of necessity for going to *Clifton*, he had not for staying there; and therefore they discharged a similar rule.

Chitty and *Wilde*, in support of the rule, contended, that the affidavit had shewn that the deviation was necessary, and the time *bond fide* employed in the purpose which made it so. The Vice-Chancellor's order was imperative on the defendant, and was in the nature of a *subpœna*

(a) 1 *Smith's N. P. Rep.* 355. (b) 3 *Barn. & Ald.* 252.
duccs

duces tecum; and if an attachment had been applied for to the Court of Chancery for not bringing his papers with him, it would have been no excuse to say, that he was deterred from procuring them by apprehension of an arrest. It is quite clear that a party attending an arbitrator under an order of the Court of Chancery, is privileged from arrest, *Moore v. Booth* (a): and the Court of *Common Pleas* have held, that as to what is the nearest and direct road, a witness is not bound to go what others may consider the nearest, and the construction should be fair and liberal, *Willingham v. Matthews* (b): and a man cannot be fairly expected to travel two hundred miles direct, so as to be fit for business on his arrival without taking rest on the road.

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As to the decision in the case of *Randall v. Gurney*, they urged that in a determination, proceeding on a view of the *bonâ fide* conduct of a party, a decision, in which the *Lord Chief Justice* differed, ought not to conclude the party or the Court. In that case the *Lord Chief Justice* held, that the deviation was not unreasonable, or the delay too great; and he observed, that taking the defendant's attorney with him was a mark of *bona fides*; and in this case the affidavits are, in many respects, much stronger than those upon which that rule was obtained.

The *Lord Chief Baron* was absent at *Guildhall*.

(a) 3 Ves. 350.

(b) 2 Marsh. 57.

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GRAHAM, *Baron*, having expressed his regret that the Court was not full, as there was a difference of opinion on the Bench, and he had himself had doubts of the opinion which he had ultimately formed, stated his inclination to be, that the rule should be made absolute.

The general rule (observed his Lordship) is quite clear and well understood; and it is also reasonable that immaterial deviation and accidental delay *in eundo et redeundo* should not deprive a party of his very useful privilege. The *morando* also should include purposes of natural rest and necessary refreshment, and ought to be construed with liberality. I do not rely on the particular circumstances of this case, as I think there can be no doubt that the defendant was keeping aloof from his creditors; but I found my opinion on general grounds, and I think in a general way the defendant's reasons for taking *Clifton* in his road, where he had left his papers, and where his wife and family resided, was an unobjectionable one; and if it was, he must be allowed a reasonable time for their selection, and the preparation for taking them with him. In that case the question here will be simply, whether they were necessary; and whether their assortment required so much delay.

His Lordship then adverted to the material facts detailed in the affidavits and the dates, and observed that if the facts stated were true, the deviation

violation was by no means unreasonable, and the occasion well warranted it, and accounted also satisfactorily for the delay. I may indeed have certain impressions unfavourable to the present application, under the circumstances of suspicion which surround the particular case; but they are not sufficient to counterbalance the positive affidavits on which this rule was obtained, of the necessity of the papers, and the time required to procure them; although, as a Jurymen, I might not be disposed to give credit to all that has been stated: but I am bound here by what is so sworn and not contradicted; and I think, that if it were true, it would be enough to privilege the defendant; and therefore the arrest was a breach of that privilege, and the defendant is entitled to have this rule made absolute.


Wood, *Baron*.—There are two questions in this case for the consideration of the Court. One is whether it was necessary for the defendant to go to *Clifton*: the other, whether, if it were, he staid there longer than was necessary for the purpose which required his going there. Those are the two points.

As to the first, it is quite clear that the journey to *Clifton* was necessary, for it is not denied that there were material papers there which it was material that he should produce before the arbitrator.

Then

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Then arises the other question, as to the time of his staying there, or whether he was arrested before he had finished the business which took him to *Clifton*. It is positively sworn that after his arrival on the 17th, he immediately set about the business, and was employed during part of that day, and nearly the whole of the next, in examining and arranging the necessary papers, and that *before he had finished he was arrested*. No part of that statement is contradicted; and against the positive affidavit can we say, that under such circumstances the defendant was not within the protection of the privilege? I agree that the protection is not to be abused, and if the *morando* were shewn to be wanton and unnecessary, we should discharge this rule. Under the circumstances, however, I am of opinion that it should be made absolute.

GARROW, *Baron*. — As the majority of the Court entertain a different opinion from that which I have formed upon this case, I am bound by their decision, and it is of little consequence in this instance what my opinion may be. On general grounds, however, I will state my reasons. I should be disposed to go as far as any one in protecting, in all its facilities, the due administration of justice, but I must be satisfied, before I hold a party to be protected by the rule which privileges witnesses from arrest, that the conduct of the party claiming the privilege is such as brings him within that rule, before I can consider him entitled to the protection.

I should

I should have been better satisfied if the defendant had gone with this application, or with that of which he before tried the experiment in the Court of *King's Bench*, before the Lord Chancellor, upon the intimation of my Brother *Bayley**; for if his Lordship should be of opinion that the Court of *King's Bench* were right in their view of the case two days ago, we shall, by our determination of to-day, have deprived the present plaintiff of the advantage of that decision in this particular instance.

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I admit that there should be time allowed for rest and refreshment to witnesses *bonâ fide* proceeding on the business from which their protection arises; but what I object to in the present case, is the manner in which the party makes out his claim to protection, and which is done entirely upon his own *ex parte* statement; and I am not at all satisfied with his case, even upon his own shewing. He states matters, which cannot well be contradicted, in a very general way without any particulars. He does not tell us what papers were necessary, or in any way account for the length of time which he says was consumed in seeking for them: and how can it be contradicted that he was necessarily employed, as he says he was, unless he shews what they were about during the two days? I think he should have gone on to say what progress they had made, and what still remained to be done, and what time it took them

* See his judgment in the case in *K. B.* p. 255.

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1819.

Saturday,
27th Nov.

SHAW, calling himself Executor of the last Will and Testament of WILLIAM SHAW deceased,
v. MANSFIELD.

IN *Trinity* Term last, a motion had been made by *D. F. Jones*, for judgment, as in case of a nonsuit, for not proceeding to trial according to the practice of the Court. The affidavit on which the motion was made, stated merely the proceedings with their dates, and the plaintiff's default in not going on trial.

Jervis, in the same Term, had shewn cause against that rule, upon an affidavit that the plaintiff had brought his action in the character of executor, having duly obtained probate, but that the probate having been revoked by the Ecclesiastical Court, the plaintiff had been unable to proceed—*Jones, D. F.* for the defendant, had tendered affidavits in reply, explaining the circumstances under which the plaintiff had obtained probate, and the reasons for which it had been revoked: but the Court, having refused to receive any affidavit in reply, the rule was made absolute, for judgment, as in case of a nonsuit "*without Costs.*"

A plaintiff suing as executor, having been appointed under a former will which the testator had afterwards revoked, and having obtained probate surreptitiously of the first will which was soon after annulled by the prerogative Court who also revoked the probate, on that ground, after the action commenced, held liable to the costs of the cause.

A rule obtained by the plaintiff for judgment, as in case of a nonsuit, being made absolute, generally, without costs, applies only to the costs of the motion—not to the costs of the suit.

Jones, for the defendant, early in this Term, moved for and obtained a rule to shew cause why the plaintiff should not pay him *his costs of the*

The Court, on a rule to shew cause, will not hear affidavits in reply.

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cause, to be taxed by the Master. The affidavit in support of this motion, admitted, that *Shaw*, the plaintiff, had been appointed executor by a former will of *William Shaw*, the deceased, bearing date *January* 1st, 1818, but alleged that the deceased had made a subsequent will, bearing date the 16th *February*, 1817, and thereof appointed the defendant *Mansfield* executor—that after the death of the testator, and immediately after his funeral, the last will, of the date of the 16th *February*, was read over to the relations, amongst whom was *Shaw*, the plaintiff—that upon that occasion the plaintiff neither disputed the will of the 16th *February*, nor insisted upon, or even alluded to the will of the 1st of *January*—but that immediately afterwards he surreptitiously obtained probate of the will of the 1st of *January*, and under that probate possessed himself of the estate and effects of the testator—that he shortly afterwards held the defendant to bail for a sum which the defendant had owed to the testator at the time of his death—that whilst the defendant was taking measures in the Ecclesiastical Court to annul the probate, and to establish the subsequent will, the plaintiff was urging the proceedings at law to recover judgment in the action against the defendant before the decree of the Prerogative Court could be obtained—that in order to prevent the proceedings in the action at law, outstripping the proceedings in the Prerogative Court, an injunction from the Court of Chancery had been obtained—and, lastly, that the Prerogative Court had revoked the probate granted to the plaintiff

plaintiff, had pronounced for the force and validity of the subsequent will, and had condemned the plaintiff in costs.

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Against that rule for payment by the plaintiff of the defendant's costs of the cause in the action at law,

Jervis now shewed cause, contending, that the present motion was an experiment not warranted by any authorities, nor supported by any known principle of law. In the first place, it is an attempt to overturn what the Court has already decided in the present suit; for, upon the former motion, for judgment as in case of a nonsuit, the Court, upon the ground of the plaintiff having sued as executor, made the rule absolute, "without costs," which must have been meant to comprise not merely the costs of the *motion*, but also the costs of the *cause*. But, secondly, independently of the former adjudication, there is no pretence for charging the plaintiff with the costs of the cause; because the plaintiff sued as executor. At the time of the action brought, the probate was unrevoked; and it would be contrary to the policy of the rule of law to charge with costs a party who sues in a representative character on account of the subsequent revocation of his authority, which revocation may have been founded on reasons of which he had no knowledge, or over which he had no controul. But the present point has been expressly ruled, for in *Howard, Executor &c. v. Ratborne (a)*, it was held, that an executor shall

(a) Willes, 316.

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not pay costs under the statute 14 Geo. II. c. 17, for not proceeding to trial according to the course and practice of the Court in which the suit was instituted. The cases of *Bennet*, Administrator, v. *Coker* (a), *Booth* v. *Holt* (b), *Cooke* v. *Lucas* (c), are to the same effect.

Jones, D. F., in support of the rule. As to the first point, the Court did not, upon the former motion, decide the question which is now brought before them. Upon the motion for judgment, as in case of a nonsuit, by the terms "without costs," the Court could only have intended the costs of the motion, and, not the general costs of the cause. That is the ordinary meaning of the term "costs," on motions of that kind. Besides, the Court had then no materials before them to enable them to decide as to the right to costs of the cause, for the defendant's affidavit, according to the ordinary course, related only to the dates of the proceedings, with a view to shew the plaintiff's default; and no affidavits in reply could be received as to the *merits* which were partially and colourably introduced by the plaintiff's affidavit. Then, as to the second point, there is no doubt as to the cases that have been cited. Where a plaintiff sues as executor, having obtained probate without fraud, and prosecutes a claim which he has no reason to believe to be unfounded, he is not to be charged with costs under statute 14 Geo. II. c. 17, for not proceeding to trial, unless he has been

(a) 4 Barr. 1927. (b) 2 H. Bla. 277. (c) 2 East, 325.

guilty of *laches*; of *wilful delay*. Such is the general rule. But the present is the case of a plaintiff, who fraudulently and surreptitiously obtains probate, knowing of the existence of a subsequent will, and who sues and holds to bail the executor appointed by the rightful will. This is therefore a gross abuse of the process of the Court. Executors are not excepted in the statute 25 Hen. VIII. c. 15; or in the statute 4 Jac. I. c. 3, which enact, that costs shall be yielded to defendants in the cases therein mentioned "by the discretion of the Justices." But those statutes having been passed for the purpose of preventing groundless and malicious suits, the construction put upon them has, under the terms "by the discretion of the Justices," exempted from costs persons fairly and *bond fide* prosecuting claims as executors. This exemption proceeds upon the presumption that the executor is unacquainted with the transactions of his testator, and upon the ground that it would be an unreasonable exercise of the discretion of the Court to render the executor responsible for any infirmity in claims as to the validity of which he had no knowledge. But here the plaintiff not only knew that his claim against the defendant was not founded in legal right, but he also assumed a character to which he knew that he was not entitled. It would therefore be absurd to include him in a constructive exemption that was intended only to extend to persons *bond fide* promoting claims *in auter droit*, which they believed to be just. Where an executor, being plaintiff, is guilty of *laches*, or

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wilful delay in the progress of a cause, he must pay costs. *Harris v. Jones*, (a) *Hawes v. Saunders*, (b) *Higgs v. Warry*, (c) *Booth v. Holt*, (d) *Anon.* (e), *Eaves v. Mocato*, (f) *Rex v. Powell* (g). *A fortiori* where an executor is not merely guilty of misconduct in the progress of the cause, but is from the very beginning culpable in commencing it, he ought to be liable to costs. *Comber v. Hardcastle* (h), *Melhuish v. Maunder* (i), *Zachariah v. Page* (k).

Per curiam. Upon the former motion, our decision could have related to no costs but the costs of the *motion*. We had no materials for any adjudication as to the costs of the *cause*. And as to the principal question, it is clear, upon the authorities stated at the bar, that the plaintiff is not, under the circumstances, within the exemption which ordinarily attaches to the case of executors.

Rule absolute.

(a) 1 Bla. Rep. 451.

(b) 3 Burr. 1684.

(c) 6 Term Rep. 654.

(d) 2 H. Bla. 277.

(e) 7 Mod. 98.

(f) 1 Salk. 314. S. C. 2 Ld.

Raym. 866, called *Elwes*, Executrix of *Elwes v. Mocato*.

(g) Stra. 33.

(h) 3 Bos. & Pul. 115.

(i) 2 New Rep. 72.

(k) 1 Barn. & Ald. 399.

END OF MICHAELMAS TERM.

AN

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ACCOUNTS (Public).

1. Public accountants, who may have reason to be dissatisfied with the determination of the Board of Commissioners for auditing the public accounts, in disallowing their articles of discharge, or imposing surcharges on them, have a right to the interposition of the Court of *Exchequer* in their behalf, on a suit instituted for that purpose: and the Court (who have competent jurisdiction to do so) will relieve the complainants on a case of

equity being made out by them, by referring the accounts back to the Commissioners to review their allowances &c. or they will, as they were formerly wont, in the case of the Auditors of the *Prest*, direct them to make such special allowances to the Accountant as shall seem to the Court to be just, and to prepare the same accordingly for final declaration.

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4. Servants of the public appointed by commission under the Crown, without any stipulated remuneration, have no legal claim to specific compensation, whether the nature of their duties are analogous with well known employments, which, when engaged in between subjects, are remunerated by established rate *per cent.*, or otherwise, by acknowledged usage or custom (*ex. gr.* prize agents), or in other cases where the value of the services can be ascertained by such means. Such servants are wholly dependent for remuneration on the will of the Crown, or the judgment of those to whom competent authority may be, in that respect, delegated.

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1. Where the defendants, in an extent in aid, have withdrawn their plea, and suffered judgment to be entered up, upon an agreement to submit to arbitration the question of *the amount* of what is due to the prosecutor, *provided the award be made by a given time*, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendants having delayed to furnish him with the name of a trustee, which was required to make part of the award, and the defendants solicitor afterwards wrote a letter, requiring that the arbitrator *would take into consideration matters* not before him during the reference, which was refused, as the reference was considered to be closed:—It was held by the Court, that under those circumstances the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority; for that the conduct of the defendants, and the solicitor's

letter, was equivalent to a consent to extend the time; and therefore they refused to *set aside the judgment*, and the proceedings thereon, *and the award*, and allow the defendants to plead to the extent.

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(Of England.)

Vide PRACTICE (in Equity), N^o. 7.

BANKRUPT.

1. A defendant, against whom in an action for damages, on a tort, a verdict has been taken, subject to the award of an arbitrator, held to be discharged from the debt by his certificate, obtained before the entering up of judgment, where he had become bankrupt, between the verdict and the making of the award, and that execution could not be sued out on the judgment; because the plaintiff might have proved the damages recovered

under the commission by production of the record.

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A *fiery facias* issued on a judgment entered up under such circumstances, and executed, set aside on the terms of the defendant undertaking to bring no action against the sheriff.

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3. A trader by lying in prison for two months on an arrest for debt, commits an act of bankruptcy, although he may be confined originally, and during the same period under a magistrate's warrant, on the certificate of Commissioners of bankruptcy, on a criminal charge of refusing to submit to answer questions; because, as he may at any time be liberated by submission, the lying in prison is voluntary, and therefore within the 21st James, ch. 1. s. 2:—and more especially if his attorney have obtained a Judge's order for his release as to that warrant, upon the Commissioners certificate that they do not mean to examine him further, although the order be not made a rule of Court, or acted upon, and the trader knows nothing of it.

Ib.

4. *Vide* WITNESS.

BEQUEST.

1. A gift of the residue of a testator's personal estate to trustees for the perpetual endowment and maintenance of a school, would be a valid bequest, and not within the statute of the 9 Geo. II. ch. 36.

But if after such completed bequest, the testator goes on to recommend the trustees to collect the residue, and lay it out at a convenient time in the purchase of freehold lands, &c. for that purpose, it comes within the statute, because the word "recommend" is imperative on the trustees, and leaves them no discretion, but raises a trust, which must be carried into execution, unless there be in some other part of the will an express option given to them in terms so to lay out the money, or not, in their discretion.

Kirkbank and others v. Hudson and others - - - 212

2. *Vide* CONSTRUCTION (of Will).—DEVISE.—LEGACY, N^o. 1, 2.

BETTING.

Vide MONEY (Had and Received).

BILL.

(*In Equity.*)

Vide PLEADING (in Equity).—PRACTICE (in Equity), N^o. 1, 2, 3.

(*Of Exchange.*)

Vide EVIDENCE, N^o. 2.—PARTNERS.—VENUE.

BOND.*(Bail.)*

Where a plaintiff, who has taken an assignment of a bail-bond, after bail have been put in, but not perfected, consents by his clerk in Court to an order for staying proceedings on payment of costs, he is not entitled to have the security of the bond, although he may have lost the opportunity of going to trial, because it is in such a case the result of his own conduct.

Blore v. Mottram - - - 535

(Replevin.)

Vide INJUNCTION, N^o. 1.

BREACH.*(Assignment of.)*

Vide PLEADING (at Law), N^o. 1.

C.**CHARITY.***(Effect of Words of Gift to.)*

Vide BEQUEST.

COLLECTOR.*(Of Taxes.)*

Vide APPOINTMENT OF. — CONSTRUCTION (of Statutes), N^o. 2.

COLLOQUIUM.*Vide* INNUENDO.**COMMISSIONERS.***(For auditing the Public Accounts.)*

How far subordinate to and under the controul of the Court of *Exchequer*.

Vide ACCOUNTS (Public).—CONSTRUCTION (of Statutes).—JURISDICTION.

CONSOLIDATION.*(Of Causes in Equity.)*

Not practicable.

Vide PRACTICE (in Equity), No. 2.

CONSTRUCTION.*(Of Statutes.)*

1. The statute of 25 Geo. III. ch. 52. has not given to the Lords Commissioners for executing the office of Lord High Treasurer, any judicial authority over the Commissioners for auditing the public accounts, in exclusion or derogation of the paramount jurisdiction of the Barons of the *Exchequer*.

The statutes providing for the relief of subject Accountants, who have equities against the Crown, held not to be confined to cases where the subject be actually sued or impleaded, but he may proceed by bill in equity in

the first instance, and as it were *quæsi* times, and that during the passing of his accounts before the Commissioners.

Colebrooke, Bart. and others v. The Attorney-General and others 146

2. The statute 56 Geo. III. ch. 110. is *general*, and extends to *all* tanners, whether using bark or *sumack*: and the penalty imposed on the removing and concealing any hides or skins from the view of the officer, is *cumulative* on the penalty imposed by the 9th of Anne, ch. 11, s. 17.

The Attorney-General v. Kent 533

3. If there be two collectors of taxes appointed under the 43d Geo. III. ch. 89. s. 13. for a single parish, by the Commissioners, *one* for one division of the parish, called the *Upper Parish*, and *one* for another, called the *Lower Parish*, and they accordingly collect the taxes separately from the several inhabitants of their respective divisions—in case of a deficiency in the amount of the taxes collected, through the misconduct of *either*, the *whole parish* must be re-assessed, and not the particular district the collector of which has misapplied the money, and from the collection of whose taxes the deficiency arises; although the taxes of other division have been collected and paid over to the receiver-general, the appointment being held by the Court to be considered as one appointment of *two* for the *parish*, which would be valid under the act, and not of *one* for each sub-division, which would be invalid—the converse of the decision in the case

of *Barrs v. Digby and others*, 1 Bos. & Pul. N. R. 281.

Ex parte the Inhabitants of the Parish of Hentlan - - 594

4. *Vide* BANKRUPT, N^o. 2, 3.—EXTENT, N^o. 2.—FORGERY.—INFANT.

(Of Wills.)

5. Where a testator, having bequeathed the residue of his personal estate to trustees for the perpetual endowment or maintenance for two schools, introduced the following clause in his will:—
“ And I recommend that at a convenient time my money shall be collected together and laid out in the purchase of a freehold messuage and tenement, or lands which are freehold, to be a perpetual endowment for the two schools:” the bequest was held to be void; because the recommendation so to dispose of the money being imperative upon the trustees, created a trust which left them no power to refrain from laying it out in land, brought the gift within the statute of 9th Geo. II. ch. 36. s. 3. (the mortmain act.)

Kirkbank and others v. Hudson and others and The Attorney-General 212

6. Such a bequest would otherwise have been good; or if there had been in any part of the will a discretion given to the trustees as to laying out the money in land or otherwise, applying it to the use of the charity.

Id.

7. Real estate being devised in trust to sell *at such time* or times, after

the testator's decease, as should seem most advisable, either together or in separate parcels, by auction or private contract—the trustees to stand possessed of the produce of the sale, and the rents and profits accruing in the mean time upon the trusts of the will—held not to invest the trustees with an unqualified discretion in respect of the sale, or to entitle them to retain the accumulation of the rents and profits in their hands, to answer the exigencies of the will; but that the residuary *cestui que trust* were entitled to receive their respective proportions of the accruing rents and profits, from the end of the year after the death of the testator, on the principle of the rule laid down in *Sitwell v. Barnard* (6 Ves. 520): the words “as should seem most advisable” being held to be equivalent to “with all convenient speed.”

Noel and others v. Lord Henley and others - - - 241

8. A devise of real estates to be sold to pay particular debts and legacies out of the produce, held not to be a general exoneration so far of the testator's personal estate, in all events, but a partial exemption, only in favour of the person to whom he had bequeathed the residue of his personal estate: and the bequest of such residue having become lapsed by the death of the legatee in the testator's life-time, the residue was held to be no longer exonerated on behalf of the testator's next of kin; but had again become chargeable with such particular debts and legacies, thereby again exonerating the real estate devised to be sold in favour of the trust created on

behalf of the residuary legatees, of the produce arising from the sale of the devised estate.

Noel and others v. Lord Henley and others - - - 241

(Of Powers.)

Vide LEASE.

CONTRACT.

(For separate Maintenance of Wife.)

Where invalid.

Vide HUSBAND and WIFE.

COPYHOLD.

Vide INFANT.

COSTS.

1. Where a motion is successfully opposed, on grounds not affecting the merits of the application, and for which there is shewn a reasonable and fair foundation, the Court refusing it, will do so without making the failing party pay costs to the other,

Bligh v. Benson - - - 265

2. A rule having been obtained for staying the *postea* in the hands of the associate, for the purpose of having the bill of an attorney taxed, who had obtained a verdict for the amount, qualified by the Jury having added, “subject to taxation,” it was discharged with costs.

Hewitt, Gent. v. Ferneley - 234

3. Rule, for judgment as in case of a nonsuit for not proceeding to trial after issue joined in an ejectment, and notice of trial given, discharged on a peremptory undertaking *without costs*, where the plaintiff gave a satisfactory reason for not proceeding pursuant to his notice, and had done all he could to apprise the defendant as early as possible that he should not try the cause.

Weak, d. Burge v. Callaway and others - - - 531

4. A party attempting to get an injunction dissolved before the hearing, on an affidavit of special circumstances, must pay the costs of such an application if he fail.

Hayward v. Greenwood and others 537

5. A motion to remove a *distringas*, served on the Bank, refused, with costs.

Toulmin and others v. Copeland and The Bank of England - 631

6. The full costs (taxed) are given in *this Court* on allowing a demurrer to the whole bill.

Jones v. Jones and others - 663

7. Where a plaintiff signs judgment and executes a writ of inquiry of damages, treating a special demurrer by the defendant, who was under terms of pleading issuably, as a nullity, and the Court set aside all the proceedings on an application for that purpose, founded on the fact of the demurrer being *bonâ fide*, and the causes sufficient, they will order the plaintiff to pay all the costs.

Langford v. Waghorn - - 670

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8. Production by plaintiff of a rule obtained by defendant for payment of money into Court, and the Master's *allocatur* of a certain sum for costs is sufficient evidence of the plaintiff's election to take the sum paid into Court; and if he afterwards proceed for the costs taxed and not paid, he need not prove a previous demand at the trial.

A nonsuit on that ground set aside.

Smith v. Battersby - - - 674

9. Where the Court, under special circumstances, granted a new trial of an action of *ejectment*, when a verdict had been found for the defendant, they imposed on him the terms of first paying the costs of the former trial, and of the application.

Weak, d. Burge v. Callaway - 677

10. A plaintiff, suing as executor, having been appointed under a former will which the testator had afterwards revoked, and having surreptitiously obtained a probate of the first will which was soon after annulled by the Ecclesiastical Court who also revoked the probate, but not till after the action had been commenced against the defendant who was the executor of the last will, held liable to the costs of the cause.

Shaw v. Mansfield - - 707

11. A rule for judgment, as in case of a nonsuit, being afterwards made absolute generally *without costs*; that part of the order applies only to the costs of the application, not of the cause.

Ib.

COUNTS.

*(Joinder of.)**Vide* PLEADING (at Law), N^o. 4.

COVENANT.

Vide HUSBAND and WIFE.—PLEA (at Law), N^o. 1.—PLEADING (at Law), N^o. 1.

D.

DAMAGES.

Recovered in an action for a *tort*, subject as to the amount to arbitration, may be proved under a commission of bankruptcy by production of the record.

Beeston v. White 200

DECLARATION.

Vide PLEADING (at Law), N^{os}. 1, 2, 4.

DEED.

(Of Separation.)

Where void,

Vide HUSBAND and WIFE.

DE INJURIA.

(Replication of.)

Where held ill.

Vide PLEADING (at Law), N^o. 5.

DEMISE.

Vide LEASE.

DEMURRER.

1. On the ground of want of jurisdiction to a bill filed against the Attorney-General by an accountant, for the purpose of obtaining a decree that the Commissioners for auditing the public accounts should review their declaration of allowance—over-ruled.

Colebrooke, Bart. and others v. The Attorney-General 192

2. *Vide* COSTS, N^o. 11.—INSOLVENT (Debtor).—PLEA (at Law), N^o. 1.—PRACTICE (at Law), N^o. 4.—PRACTICE (in Equity), N^o. 12.

DEVISE.

1. Devise of testator's real estates in A., derived from the bounty of a collateral branch of his family to trustees, upon trust to sell, to pay off two mortgages on another real estate in B., inherited from his ancestors and devised by his will in strict settlement—and to pay to his wife 5000*l*. in part satisfaction of 10,000*l*. secured to her by their marriage settlement out of certain trust funds—and to pay a legacy of 3000*l*. to a legatee, one of the present plaintiffs (he being also one of the devisees of the residue of the money to arise by the sale of the said real estate), as soon as sufficient monies should have arisen by the said sale, and after satisfaction of the payments in the will before directed to be

made thereout, the legacy to carry interest from the testator's death—and also to pay such part of such other of his just debts, and of the other pecuniary legacies by him thereafter given and bequeathed, or which he should give or bequeath, as his personal estate not thereafter specifically bequeathed and the personal estate bequeathed to him from the same source as the first mentioned real estate should not extend to pay and satisfy—and after such payment to invest the same in government securities in their (the trustees) names, in trust to pay the dividends in a certain prescribed manner for the benefit of the plaintiffs and their families: and, after giving various other pecuniary legacies, the testator directed that all the legacies given by him should be paid in full, without any deduction for the legacy duty, and (where no time had been mentioned for their payment) within twelve calendar months—he then gave all the residue of his personal estate to his wife, whom he appointed executrix, and he made the trustees executors of his will—the testator's wife died in his lifetime:

Held, that the trust, for the payment of those particular debts and legacies out of the real estate devised to be sold, was not a general exemption of the personal estate to the extent of their amount, in all events; but that it was only a partial exemption, on behalf of the person to whom the testator had bequeathed the residue (his wife): and that that bequest having lapsed, the residue of the *personal* estate was no longer exonerated in favour of the next of kin, but had again become chargeable with all the burthens

to which personalty is primarily liable, viz. the personal and proper debts of the testator, and legacies not otherwise provided for—once more exonerating the *devised* estate in favour of the trust on behalf of the residuary legatees.

It was therefore declared that the mortgage on the estate in *B.* should be paid off out of the personalty, and that the other (which was an incumbrance on the derivative estate in *A.* before it became the testator's property) should be paid out of the produce of that estate: that the 5000*l.* which had lapsed was not a resulting trust for the benefit of the heir-at-law, but was (as well as the payment of the mortgage debt, which was not originally the proper debt of the testator) a simple charge on the devised estate, which might be discharged by the devisees: and that it was not obligatory on the trustees to sell the devised estates absolutely in the first instance.

Noel and others v. Lord Henley and others - - - - 241

2. *Vide* BEQUEST. — CONSTRUCTION (of Wills).—HEIR AT LAW.

DISCHARGE.

(*Of Surety.*)

Vide INFUNCTION.

(*Of Partners.*)

Vide NOTICE.—PARTNERS.

(*Of Bankrupt.*)

By Certificate.

Vide BANKRUPT, N^o. 1.

DISCOVERY.

Vide EVIDENCE (Documentary).

DISTRESS.

Vide LANDLORD and TENANT.—
RENT.

DISTRINGAS.

Vide PRACTICE (in Equity), N^o. 7.

DOCUMENTS.

Vide EVIDENCE, N^{os}. 3, 4.—PRACTICE (in Equity), N^o. 8.

E.

EJECTMENT.

Vide INJUNCTION, N^{os}. 2, 6.—
LEASE.—NEW TRIAL, N^o. 1.

EVIDENCE.

1. In a suit against the Crown, to which the assignees of a bankrupt who, but for his bankruptcy would have been in the same interest with the plaintiffs, are made defendants, the bankrupt himself cannot be examined as a witness on behalf of the plaintiffs, although he has released the assignees, because the Crown

is not bound by the statutes relating to bankrupts.

Craufurd and others v. The Attorney-General and others - 2

2. In an action against other partners on a bill accepted by one of them in the name of the firm, the admissions in his answer filed to a bill in equity against him, are not admissible in evidence against the rest.

Rooth v. Quin and Janney - 183

(Documentary.)

3. The Court will not, on a bill for tithes, praying a discovery of documentary evidence, order a tithe book of a former rector, shewn to have been in the possession of the defendant's attorney, to be produced, unless it clearly appear from admissions in the answer that it would assist the plaintiff's case.

But where the Court refuse such a motion for the above reason, they will not do so with costs, if enough be shewn to give colour for the application.

Bligh v. Benson - - - 205

4. If a power to demise refer to "such ancient and accustomed, or as great and beneficial rents, duties, and services, as had formerly been reserved (&c.);" or if from its general tenor it may be collected that the creator of the power intended that the maker of the leases should have regard to the state of the property during former occupations, the form and covenants of such previous leases may be taken as a guide by the lessor in framing new leases, and the contents of the former may be received in

evidence on a question, as to whether the power were well executed, affecting the validity of such new leases, to shew that they were framed in the same terms as those of the old leases.

Smith, Lessee of Earl of Jersey v. Doe - - - - 379

5. *Vide* DAMAGES. — ONUS. — PROOF.—STOCK.—WITNESS.

EXCEPTIONS.

Rule as to arguing.

Vide PRACTICE (in Equity), N^o. 4.

EXCISE.

Vide CONSTRUCTION (of Statutes), N^o. 3.

EXECUTION.

Vide BANKRUPT, N^o. 1.—LANDLORD and TENANT.—SHERIFF.

EXECUTOR.

Vide COSTS, N^o. 8.

EXTENT.

1. The Court will not grant a new writ of extent of the date of a former tested several years before (between 8 and 9 in this

case), on the ground that the defendant has been since found to have been further indebted to the Crown, and to have had at the time of issuing the first extent property not then known to belong to him; and though his goods and chattels, seized and sold under that writ, produced only so much as would satisfy but a very small part of the Crown's original debt.

But a new writ of present testis should be issued, which may be done at any time on application to a Baron, where, while the Crown debt be unsatisfied, the defendant becomes possessed of newly-acquired property.

The King v. Harvey - - - 238

2. Bankers having money in their house, arising from the assessed taxes, paid in for the purpose of being paid over to the *Exchequer*, on account of a Receiver General, for the due payment of which by him they have given bond to the Crown, are still entitled to sue out an extent in aid—and that upon affidavit stating *generally* their having received the money for that purpose; nor is it necessary that they should shew, by allegations in the affidavit, made to obtain the fiat, that they are not precluded by the 57th Geo. III. from using the Crown process, as that, being sureties, they have been called upon by the Crown, on account of the default of their principal, or in any other respect.

The King (in Aid of Stuckey and others) v. Gibbs - - - 633

3. *Vide* PRACTICE (at Law), N^o. 5.

F.

FELONY.

*(What amounts to.)**Vide* FORGERY.*(What does not.)**Vide* BANKRUPT, N^o. 2.

FIERI FACIAS.

Vide LANDLORD and TENANT,
N^o. 1.

FOREHAND RENT.

May be distrained for, and will support a claim against a sheriff taking the tenant's goods in execution for *rent due*, within the statute of Anne.

Vide LANDLORD and TENANT,
N^o. 3.

FORGERY.

The making of a written instrument, purporting to be an order of a magistrate, and to be signed and sealed by *J. P.* as such, under the 48th Geo. III. ch. 75. addressed to the Treasurer of the County Rates, requiring him to pay *J. C.* a sum of money which he had made oath that he had expended in removing and burying a dead body cast on shore, by means of which the maker obtained that sum of money from the treasurer, is FORGERY; although the prisoner did not ob-

tain the money in character of any of the parochial officers named in the statute, and although there was no magistrate in the county of the name of *J. P.*

The King v. Froud - - 609

G.

GENERAL ORDERS.

Vide PRACTICE (in Equity),
N^{os}. 6 & 15.

GIFT.

(Of Stock.)

What acts amount to.

Vide STOCK.*(To Charitable Uses.)*

Where void.

Vide BEQUEST.

GOODS (Sold and Delivered.)

Vide VENUE.

GRANT.

(Of the Crown.)

If a grant by the Crown of tithes cannot be shewn to have ever been acted upon, it is no defence against a claim by a Vicar for tithes. To make it so, perception under it must be proved.

Scott v. Lawson and others

H.

HEIR.

(*At Law.*)

Vide DEVISE.—PRACTICE (in Equity), N^o. 12.

(*Customary.*)

Vide INFANT.

"HERBAGE."

In ancient grants, does not include tithe of agistment.

Scott v. Lawson and others 267

HUSBAND AND WIFE.

A deed made between husband and wife, and a third person (a trustee) with a covenant by the husband to pay such third person an annuity, in case the wife should live separate and apart from her husband, and should take one of her children to reside with her, is (*semble*) void, as being a deed made in contemplation of a future separation at the pleasure of the wife, and therefore contrary to the policy of marriage.

Durant v. Titley - - 577

Vide PLEA (at Law), N^o. 1.

I.

IMPERTINENCE.

1. An instrument in possession of a defendant, which is material to both the plaintiff's and the de-

fendant's case, and is inquired of, in certain respects, by the plaintiff's bill filed to restrain proceedings at law on it, must not be set out more at length in the defendant's answer than is sufficient fairly to satisfy the plaintiff's interrogatory, or it will be subject to be referred for impertinence.

The King v. Teale and Another 278

2. Needless prolixity is in itself impertinence, although the matter be relevant.

Slack v. Evans - - *Id.*

INDORSEE.

(*Of a Bill of Exchange.*)

Vide NOTICE.

INFANT.

The Court refused to direct an infant customary heir to surrender copyhold premises to a purchaser, which had been sold and conveyed to him by the deceased ancestor of the infant, for valuable consideration, and for which the ancestor had received the purchase money in his life-time, on a motion made to confirm a report, which found that the infant was a trustee within the 7th of Ann. on the ground that it was an *ex parte* proceeding, and *non constat* the ancestor was competent to sell; and therefore the Court could not say that the infant ought to be declared a trustee within the statute of Ann.

In the matter of Mary and Ann Janaway, Infants - 679
3 B 4

INFORMATION.

Vide PRACTICE (at Law), N^o. 7.

INJUNCTION.

1. Where the defendant in an action of replevin entered into an agreement with the plaintiff to refer to arbitration a prior action of replevin between them, and then entered and standing for trial at the assizes, and also other matters in dispute between them, but not the second replevin suit: and that all proceedings should in the mean time be stayed till the award should be made, and which was stipulated to be published by a future certain time, but afterwards further enlarged by the plaintiff and defendant, all without the concurrence or privity of the surety in the replevin bond, *whereby* in point of fact, *the suit was delayed* and the surety placed in a different situation by the delay and which *might have been prejudicial* to him, whether it actually turn out to have been so or not—held to affect the conscience of the defendant in equity: and therefore the Court granted a perpetual injunction to restrain him from proceeding against the surety, on an assignment of the replevin bond, obtained upon a return of eloignment.

Bowmaker v. Moore and others 223

2. The Court will grant an injunction to stay trial of an ejectment at the next Assizes, on a motion made on the 27th of February, of which notice had been given to the defendant's clerk in Court only on the 26th, if moved on

merits confessed in an answer put in only on that day, because there is *only one day* of sitting in the Hilary vacation, which ought not to prejudice suitors, and it can be no *surprise* on a defendant under such circumstances.

Hayward v. Greenwood and others 537

3. Nor will they dissolve such an injunction on affidavit, before the hearing.

It.

4. Application for dissolution so made, refused with costs.

It.

5. The Court will not change the possession by dissolving an injunction of an ejectment on motion before the hearing, even in a strong case.

Hodgson and others v. Merest and others - - - 658

6. *Vide AFFIDAVIT, N^o. 1.—INSOLVENT.—PRACTICE (in Equity), N^o. 10.*

INNUENDO.

If a person who is asked by a tradesman respecting the circumstances and credit of another, tells him that he has been paid a debt due to himself from such person, and that *he* was ready to give him credit for any thing he wanted: that representation would not be sufficient to support an action for a deceitful misrepresentation of such person's circumstances, whereby the tradesman was induced to give him credit, although such person had been before that time discharged

under an insolvent act, and the defendant knew it, but did not mention it.

Such a *colloquium* will not support an innuendo that a defendant meant thereby, that such person was in good circumstances, and fit to be trusted generally with goods on credit.

Gainsford v. Blackford - 544

INQUISITION.

(*On Writ of Extent.*)

What degree of certainty insufficient.

Vide PLEADING (at Law), N^o. 3.

INSOLVENT (Debtor).

General demurrer—to a bill filed by a judgment creditor against his debtor (who had been discharged under the Insolvent Act (53 Geo. III.) and the executrix of a will, by which he (the debtor) was entitled to a share of the residue of the testator's personal property, praying an injunction against the executrix to restrain her from paying it over to the legatee, and that the plaintiff might be paid his debt thereout—allowed, on the ground that the plaintiff had a remedy at law, under the Insolvent Act.

Otley v. Lines - - - 274

INSUPER.

If there be two collectors of taxes appointed under the 43 Geo. III. ch. 99. s. 13. for a single parish, by the Commissioners, one for

one division of the parish, called the Upper Parish, and one for another called the Lower Parish, and they accordingly collect the taxes separately from the several inhabitants of their respective divisions—in case of a deficiency in the amount of the taxes collected, through the misconduct of either, the whole parish must be re-assessed, and not the particular district the collector of which has misapplied the money, and from the collection of whose taxes the deficiency arises; although the taxes of the other division have been collected and paid over to the Receiver-General.

Ex parte the Inhabitants of Henllan
594

INTEREST.

(*On Public Money.*)

Public functionaries must account for interest made by them, on any considerable balances in their hands, of money being the proceeds of public property sold by them, in pursuance of the duties of their appointment to such a charge, although they have necessary payments to make, in the course of those duties, if their instructions on their appointment direct them to pay such proceeds into the Bank and point out a course of supplying themselves with money for their expenditure.

Quære, whether, in any case, public accountants may appropriate the interest made on large balances in their hands, as matter of right?

Crawford and others v. The Attorney-General and others - 2

JOINDER.*(Of Counts.)**Vide* PLEADING (at Law), N^o. 4.**JUDGMENT.***(Where set aside.)**Vide* BANKRUPT, N^o. 1.*Where not.**Vide* AWARD.*(As in case of Nonsuit.)**Where rule for discharged.**Vide* PRACTICE (at Law), N^o. 1.*(Arrest of.)**Vide* ARREST OF JUDGMENT.—
PRACTICE (at Law), N^o. 6.**JURISDICTION.***(Over Commissioners for auditing
the Public Accounts.)*

1. Where the Commissioners for auditing the public accounts have, in the investigation of an account rendered by a public functionary, disallowed some of the Accountant's charges, whereby he seeks to discharge himself of monies received, and surcharged him in other respects, this Court has jurisdiction so far as to examine and correct the principle on which that Board has proceeded in such

investigation, if a case of just complaint in that respect be satisfactorily made out; but they will not determine a mere question of *quantum meruit*, as between the public functionary and the Crown, in regard of the service performed, and the charges made by the former.

Crawford and others v. The Attorney-General and others - 1

Et vide the Attorney-General v. Hoseason, ante, vol. vi. p. 312.

2. The Court dismissed a complainant's bill which would necessarily have had the effect of casting upon them the duty of enquiring whether the allowances made by the Auditors to a public functionary, were a sufficient remuneration for services performed by him; because they held that to be within the peculiar province of the Commissioners for auditing the public accounts, and not a fit subject-matter for a reference to the Deputy Remembrancer or an issue.

There must in all cases of application to this Court for a review by the auditors of their allowances or disallowances, be a clear charge of manifest injustice to warrant the interference of the Court.

It.

3. The Commissioners for auditing the public accounts, as appointed under the 25th Geo. III. ch. 52. are amenable, in respect of the due discharge of the duties entrusted to them, to the jurisdiction of the Court of Exchequer, and subject to their control; that statute in forming them into a Board for the performance of the duty of that branch of the original business of the Court, being held not to have constituted them

an independent judicial body, and not to have destroyed or transferred the original authority of the Barons of the Exchequer, sitting as a Court of Judicature, over all matters of revenue accounts. The Court of Exchequer (*i. e.* the Chief and other Barons) has still, notwithstanding that statute, the same controlling power in its judicial capacity over the Commissioners for auditing the public accounts, as it previously had over the former Auditors of the Prest.

Colebrooke, Bart. and others v. The Attorney-General and others 146

JURY.

Vide VERDICT.

L.

LANDLORD AND TENANT.

1. In an action against a sheriff, for removing goods seized under a *fiery facias* without paying the landlord a year's rent, under the statute of 8th of *Anne*, wherein the plaintiff recovered a verdict, the Court refused to grant a new trial on the ground that the goods having been afterwards returned, the plaintiff had not been damaged; because while they were in the custody of the law, the landlord could not distrain them.

Lane and another v. Crockett 566

2. In an action against the sheriff for removing goods taken in execution, without paying the landlord a year's rent, it is not ne-

cessary to prove that a year's rent is due. It is sufficient to prove the occupation by the tenant.

It lies on the defendant to shew that the rent has all been paid.

Harrison v. Barry, Esq. - 690

3. Such a claim may be supported for forehand rent, or rent stipulated by the lease to be paid in advance, as being *rent due at the time of the seizure*, within the statute of *Anne*; and such rent may be distrained for by the landlord, who is aware that an execution is about to be sent down at the suit of a judgment creditor.

Ib.

4. If a landlord, who has distrained for rent, does not sell within the five days by arrangement between him and the tenant, that is no proof of collusion *per se*.

Ib.

5. The Jury having found a verdict for the defendant under circumstances affording ground for objections founded on the above points, the Court ordered a new trial.

Ib.

6. *Vide* LEASE.

LAPSED LEGACY.

Vide LEGACY.

LEASE.

Lease—by tenant for life, under a deed of settlement on marriage, giving him a power to demise the lands, &c. for lives, or years determinable on lives, upon certain

conditions, one of which was in these words, "*And so as there be contained in every such lease A power of re-entry FOR non-payment of the rent thereby to be reserved:*" immediately after the covenant by the lessees for payment of the rent, was inserted the following proviso, "*Provided always, that if it shall happen (&c.) that the said yearly rent (duties, &c. hereby reserved, or any part thereof, shall be behind, unpaid or undone, in part or in all, BY THE SPACE OF FIFTEEN DAYS next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done or performed as aforesaid; AND NO SUFFICIENT DISTRESS OR DISTRESSES CAN OR MAY BE HAD AND TAKEN upon the said premises, whereby the same and all arrearages thereof (if any be) may be fully raised, levied, and paid (&c.) it shall and may be lawful to and for (the tenant for life) his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised (&c.) wholly to re-enter &c.:*"—held, in an action of ejectment by the reversioner against the lessees, to be VALID—on the ground that the above proviso, contained in the lease for re-entry, was conformable with the power to demise contained in the deed of settlement; and satisfied the particular condition in question, on which it was to be exercised: and that the lease was therefore a good execution of the power to demise, which was held to be general, and such as authorised the lessor to annex in the fair and *bonâ fide* exercise

of a due discretion, reasonable and legal qualifications to the power of re-entry for non-payment of the rent reserved: and did not require the tenant for life to exact an absolute unqualified right to have an immediate power to re-enter on the expiration of the day on which the rent reserved should be made payable.

Both of the above qualifications are legal and reasonable, and may be annexed to a power of re-entry for non-payment of rent required by an indefinite leasing power to be contained in leases to be made under it, to temper the rigor of such a right, where the requisition in such leasing power is general in its terms, or *does not expressly prohibit their introduction* without being a departure from the exigency of the power.

<i>Doe, d. Earl of Jersey v. Smith</i>	281
<i>Same case, K. B.</i>	296
<i>Smith v. Doe, Lessee of Earl of Jersey</i>	379
<i>Lord Tankerville v. Wingfield and another</i>	343

LEGACY.

1. A specific legacy—bequeathed to a residuary legatee of the testator's *personal* property, directed to be paid out of his *real* estate devised to be sold for that and other payments (the overplus to be paid to another legatee)—becoming lapsed by the death of the residuary legatee in the testator's life-time:—*Held*, not to be a resulting trust for the benefit of the heir at law; nor to be applicable in exoneration of the personal estate for the benefit of the next of kin, but to discharge the devised estate again in favour

of the legatee of the residue of the produce of the sale.

Noel and others v. Lord Henley and others - - - 241

(Duty on.)

2. A legacy bequeathed to be paid out of the rents and profits, and the produce of sale of a real estate devised to be sold for the payment of such legacy *inter alia* being in a subsequent part of the will directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty:—*Held*, that the duty on that particular legacy must be paid out of the same fund, and not out of the personalty, the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund.

Noel and others v. Lord Henley and others - - - 242

3. The legacy duty on bequests of personal property in *India*, by will there, and administration granted under it there, is payable, if it be remitted to *England*, and applied by another administrator in *Scotland*, under administration granted in *England*.

Attorney-General v. Beatson 560

LIABILITY

(Of Partners).

Vide PARTNERS.

(Of Surety).

Vide INJUNCTION, N^o. 1.

(Of Owners of Ships).

Vide SHIP OWNERS.

LYING IN PRISON.

(Under what Circumstances an Act of Bankruptcy).

Vide BANKRUPT, N^o. 3.

M.

MEMORANDA.

208. 559. 657.

MINUTES.

(Of Decree).

Varying.

Vide PRACTICE (in Equity), N^o. 11.

MONEY HAD AND RECEIVED.

Money deposited with a stakeholder, as a bet on the event of a foot race, may be recovered from him by either party, in an action for money had and received, after the race has been run, and the parties differ as to the winner.

A nonsuit, on the ground that such actions are an idle waste of the time, and hindrance of the business of Courts of Law, set aside.

Bate v. Cartwright - - - 540

MORTGAGE.

(Out of what Funds of Testator to be discharged under particular Circumstances).

*Vide CONSTRUCTION OF WILLS.
DEVISE.*

MORTMAIN.

(Statute of).

What Bequest within—What not.

*Vide BEQUEST.—CONSTRUCTION
(of Wills).*

MOTION.

(Where not the proper Course of proceeding).

Vide EJECTMENT, N^o. 6.—PRACTICE (in Equity), N^{os}. 2 & 3.

(Where allowed to be substituted for Re-hearing.

*Vide PRACTICE (in Equity),
N^o. 11.*

N.**NEGATIVE PLEA.**

(In what Case good).

Vide PLEA (in Equity).

NEW TRIAL.

1. Motion for a new trial after a verdict for the plaintiff in an ac-

tion against the sheriff for not paying the landlord a year's rent, under the statute (8 Anne) on the ground that it was proved that the Sheriff had returned the goods taken to the landlord's premises, refused.

Lane and another v. Crockett - 586

2. The Court will in some cases grant a new trial of an ejectment, where a verdict has been found *for the defendant*—as where the lessors of the plaintiff have, since the trial, discovered that they had conclusive evidence of a material fact (the marriage of their ancestor) which they failed to prove at the trial, in consequence of mistaking the christian name of the person to whom the ancestor had been married, and where it is expected that they may be obliged to enter to avoid a fine intended to be levied before a new ejectment can be brought.

But they will only do so on terms of the costs of the former trial, and the application for the new trial being first paid.

Weak, d. Burge v. Callaway - 677

3. Where the Jury found a verdict for the defendant in an action against the Sheriff, for not paying the landlord rent due before the removal of goods taken by him in execution, at the suit of a judgment creditor, on the following grounds:—that the landlord, who relied on proof of occupation by the tenant, without shewing rent due—that the rent reserved was forehand rent, or rent payable in advance—and that the goods having been distrained,

were not sold within five days—
the Court ordered a new trial.

Harrison v. Barry - - 690

4. *Vide PRACTICE* (at Law), N^o. 6.
VERDICT.

NONSUIT.

(*Where set aside*).

Vide Costs, N^{os}. 3, 8.—MONEY
HAD AND RECEIVED. — SHIP
OWNER.

(*Judgment as in case of*).

Vide Costs, N^o. 3.—PRACTICE
(at Law), N^o. 1.

NOTICE.

1. If the plaintiff, in an action on a bill of exchange accepted by one of several partners in the name of the firm, be an indorsee, the defendants setting up a defence of want of authority to draw, in consequence of a dissolution of the partnership, must shew that the payee had notice of the resolution of the rest of the firm to dissolve the partnership, and be no longer answerable for any such bills: and if that be not done, it is not sufficient to prove that the indorsee had notice, for he is entitled to avail himself of any circumstance which would operate in favour of the payee.

Rooth v. Quin and Janney - 193

(*Of Trial of Information*).

2. Where a sufficient proceeding with effect to save the recognizance of bail on an information,

Vide PRACTICE (at Law), N^o. 7.

(*Of moving for Injunction*).

3. Where one day's notice sufficient, *vide INJUNCTION*, N^o. 2.

4. *Quære*. Whether it be necessary in an action against the Sheriff for removing goods taken in execution, without paying the landlord a year's rent, to allege in the declaration that the defendant had notice of rent being due, more particularly than by the common allegation, that he "*well knowing the premises*," removed the goods? *Semble* not. After verdict, held sufficient.

Lane and another v. Crockett 568

O.

OCCUPATION.

(*Proof of, sufficient to maintain an action against the Sheriff for a Year's Rent, under the Statute of Anno*).

Vide LANDLORD and TENANT,
N^o. 1.

ONUS.

(*Of Proof*).

Vide LANDLORD and TENANT.—
NOTICE.

ORDERS.

(*Of Court*).

Vide PRACTICE (in Equity),
N^{os}. 6 & 15.

P.

PAPER.

(Of Causes).

Vide PRACTICE (in Equity),
N^o. 15.

PARTIES.

A party filing a bill for the purpose of obtaining the interference of the Court against the Commissioners for auditing the public accounts, in respect of charges disallowed, and surcharges imposed by them, may make the Attorney-General defendant.

Craufurd and others v. The Attorney-General - - - - 1

Colebrooke, Bart. and others v. The Attorney-General and others 146

PARTNERS.

(Liability of).

Semble. A partnership firm may protect themselves from liability to pay bills accepted by one in the name of all the firm, by notice by public advertisement in newspapers, proved to have been received by the payee and indorsees, that the partnership is dissolved; although the dissolution has not appeared in the Gazette: and that even where the partnership was not for a definite and limited period, or might be dissolved at pleasure, but was for a stipulated continuing term, dissoluble only on certain conditions, which had not been performed, so that it was doubtful whether the partnership continu-

ed to exist in point of law or not, and there was no special contract amongst themselves, that the firm was not to be liable for the acts of individual partners.

Rooth v. Quin and Janney - 193

Vide EVIDENCE, N^o. 2.—PRACTICE (in Equity), N^o. 7.

PARTNERSHIP.

(Dissolution of).

When it discharges from liabilities.

Vide NOTICE.—PARTNERS.

PETITION.

(Where not the proper Course of proceeding).

Vide PRACTICE (in Equity),
N^{os}. 2, 3.

PLEA.

(At Law).

1. *Semble*, a plea—to an action of covenant against a trustee, on a deed, providing for a future separation,—that the wife afterwards lived and cohabited with the defendant for a long space of time, and then left him against his will and consent, and had ceased to live or cohabit with him since, is a good plea.

Judgment for plaintiff, on a demurrer to such a plea, by the Court of *Exchequer*, reversed, on a writ of error.

Durant v. Tittley - - - 577

2. Plea to an action of covenant that plaintiff agreed with defend-

ant and his other creditors to execute a composition deed, held ill on general demurrer.

Lowe v. Eginton - - - 604

Vide PLEADING (at Law).

(*In Equity*.)

3. To a bill against an occupier for an account of tithes arising from farms and lands, situate within the township of *K.* in the parish of *L.*, a plea that the defendant did not occupy any farm or lands within the parish of *L.* or the titheable places thereof, *allowed*.

Warrington v. Mothersill and others
606

PLEADING.

(*At Law*.)

1. Assignment of breach of covenant in general words, although in the words of the covenant, held ill upon a demurrer to the defendant's plea, because the assignment did not shew any particular act of the plaintiff, or in what particular respect he had refused to act, which amounted to a breach of his covenant.

Such bad assignment *not cured by pleading over* a set-off of a demand (claimed in a different right from that in which the plaintiff, who was an administratrix, sued) to a declaration in covenant for unliquidated damages.

Warn & Uz. Administratrix &c. v. Bickford - - - 550

2. The common allegation of "the defendant well knowing the premises," in the declaration in an action by the landlord against the Sheriff for removing goods taken

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in execution, without paying him a year's rent, will, after verdict, cure the omission of an averment, that the defendant had notice of rent being in arrear.—*So* held on a writ of error founded on that objection. *Quære*, whether any other allegation of notice be necessary?

Lane and another v. Crockett 566

3. An inquisition taken on a writ of extent finding *A. B.* indebted to *C. D.* and the other partners and proprietors of a certain society or company called *The Kent Insurance Company*, is sufficiently certain, without naming the individual members of the company, although they are not incorporated. Judgment of the Court of *Exchequer* in the case of *The King v. Ramsbottom*, (*ante*, vol. v. p. 447,) affirmed.

Ramsbottom and others v. The King
570

4. Counts on promises made to an intestate may be joined with counts on promissory notes given to the administrator, as administrator, since the death of the intestate, where when recovered, the amount would be assets.

Judgment for the plaintiff on that ground affirmed in error.

Court v. Partridge & Uz. Administratrix, &c. - - - 591

5. Replication *de injuria* to a plea of title in defendant, in an action of trespass, cannot be supported.

Langford v. Waghorn and another
670

6. *Vide* INNUENDO.—PLEA (at Law).—VENUE.

PLEADING.

(In Equity.)

1. If a vicar claiming an account of tithes throughout a whole parish, *by bill in equity*, prove his right in part of the parish only, the objection that the claim is too largely laid, is not a ground for dismissing the bill. *WOOD, R. dissentiente.*

Scott v. Lawson and others - 267

2. *Vide* IMPERTINENCE.—INSOLVENT (Debtor).—PARTIES.—PLEA (in Equity).—PROLIXITY.

POSTEA.

Vide VERDICT.

POWER.

(Given to Tenant for Life, to lease for Lives.)

Construction, Extent, and Effect of.

Vide LEASE.

PRACTICE.

(At Law.)

1. Rule for judgment as in case of a nonsuit, for not proceeding to trial after issue joined (obtained in the next Term, as it may be in *this Court*), and notice of trial given and countermanded, the plaintiff's attorney voluntarily (although too late, if it had been an ordinary case), giving a peremptory undertaking to proceed at the next Assizes—discharged,

and without costs, on its being shewn as cause that a serious domestic misfortune had prevented the plaintiff's solicitor from proceeding to trial.

The voluntary undertaking so given, however, must be afterwards made a rule of Court.

Weak, d. Burge v. Callaway and others - - - 531

2. Where an assignment of the bail-bond be taken after bail above have been put in, but not perfected, and the plaintiff's clerk in court has consented to an order for staying proceedings on the bail-bond, on payment of costs, he is not entitled to have the security of the bail-bond, because he has waived the right which arises from having lost a trial by his own conduct.

Blore v. Mottram - - - 535

3. The Court will not permit a motion to be made in arrest of judgment, after the expiration of the first four days of the Term next after the trial of the cause, and a rule *nisi* for a new trial has been disposed of. The motion should be made in the alternative in the first instance.

Lane and others v. Crockett 536

4. Where a defendant *under terms of pleading issuable, &c.* demurs specially to such a replication, because it traverses *all* the matters of the plea, whereas it should have traversed only *one*, upon which a proper issue might have been joined, if the plaintiff treat that demurrer as a nullity and sign judgment, and execute a writ of inquiry, the Court will set all the proceedings aside with costs, because the demurrer is fair and *bona fide*, and the de-

defendant is not precluded by the terms of pleading issuably.

Langford v. Waghorn and another 670

5. Notice of trial of information given from time to time from the Sittings after *Easter Term*, 1818, till the Sittings after *Michaelmas*, when it was given for the Sittings after the next *Hilary Term* (the trial having been postponed for defect of special Jurymen) and the cause was not tried on the last occasion, on account of the absence of a material witness for the Crown, who being expected till the last moment, the notice was not then countermanded—Held, a sufficient proceeding effectually to prevent the recognizance of bail being vacated, as it may be where the Attorney-General has not taken any effectual proceedings for three successive Terms.

The Attorney-General v. French 557

6. The want of an allegation in the declaration, in an action against the sheriff for removing goods taken in execution without paying the landlord a year's rent, that the sheriff had notice of rent due, is not the subject of a motion for a new trial, but should be moved in arrest of judgment.

Lane and another v. Crockett 566

7. The Court will not give a defendant leave to traverse an extent, who has let the time within which he ought to plead pass by without doing so, on the failure of a motion to set aside the proceedings.

The King (in aid of Stuckey) v. Gibbs 633

8. *Vide AFFIDAVIT.—ARREST OF JUDGMENT.—COSTS.—JURISDICTION, N° 2.—VENUE.*

PRACTICE.

(*In Equity.*)

1. The Court will not, on a bill for tithes, praying a discovery of documentary evidence, order a tithe book of a former rector, shewn to have been in the possession of the defendant's attorney, to be produced, unless it clearly appear from admissions in the answer that it would assist the plaintiff's case.

But where the Court refuse such a motion for the above reason, they will not do so with costs, if enough be shewn to give colour for the application.

Bligh v. Benson - - 205

2. If a testator's personality be clearly more than sufficient for payment of the debts, legacies, funeral, and other expences &c. so that there be no occasion to resort to the produce of the real estate devised to be sold for the purpose of creating a subsidiary fund for the exigencies of the will, the Court will proceed to decree execution of the trusts, in exoneration of the fund, without waiting for a final report, which would, in strictness, be necessary, or until all the devised property should be sold.

Noel and others v. Lord Henley and others - - 241

3. The Court will grant an injunction to stay trial of an ejectment at the next Assizes, on a motion

3 C 2

made on the 27th of February, of which notice had been given to the defendant's clerk in Court only on the 28th, if moved on merits confessed in an answer put in only on that day, because there is *only one day* of sitting in the Hilary vacation, which ought not to prejudice suitors, and it can be no *surprise* on a defendant under such circumstances.

Nor will they dissolve such an injunction before the hearing on an affidavit.

Such an application refused, *with costs*.

Hayward v. Greenwood and others 537

4. No cause can be put into the paper of twelve, till after the return of the subpoena to hear judgment.

General Order - - 530

5. Where causes are set down for further directions, a copy of the decree, and the Master's report, and the mandatory part of the decree, must be left at the Chief Baron's Chambers two days before the hearing.

General Order - - 630

6. The Court will not entertain a motion for directing the Bank to remove a *distringas* from the stock belonging to a partnership firm, on the application of a defendant, the surviving partner, even after an answer has been filed by the defendant, denying all the charges of the bill.

Such an application refused, *with costs*.

Toulmin and others v. Copeland and The Bank of England - 631

7. Causes in Equity cannot be consolidated.

Blake v. Forman - - 664

8. The Court will not make an order on *plaintiffs* (where the cause has been by decree referred to Commissioners) to produce and leave documents, &c. in their possession in the hands of their clerk in court for inspection by defendants.

Governor &c. of Shrewsbury Grammar School v. Maddock and others 655

9. The Court will not dissolve an injunction obtained) to stay proceedings in ejectment), *on motion* in favor of persons claiming under a child otherwise provided for by his father's will, on whom the legal estate in customary-hold lands intended to be devised for life or in tail to another child by the same will (subject to questions of law as to the operation of the devise) has descended for want of being surrendered to the use of the will, against parties claiming under the latter as remainder-men or purchasers, notwithstanding the devisee have covenanted with the heir that he shall stand seised to the use of himself and his heirs and assigns in case of breach of covenants afterwards broken.

Hodgson and others v. Merest and others - - 658

10. The Court will order the minutes of a decree, declaring stock "not to be part of the personal estate of an intestate," on a general claim by some of the next of kin, against a particular claim by others, to be varied, by adding the words "together with the dividends which have accrued

due thereon: on a *special motion*, without a re-hearing, where the amount is small, and the alteration is reasonable and consonant with the tenor of the original decree.

George v. Howard - - 661

11. A Court of Equity will not entertain a bill by an heir at law for setting aside and declaring void an impeached will, alleged to have been procured to be made under circumstances of fraud charged, unless some obvious definite impediment, which the Court can see, and reach, to proceeding at law by ejectment be shewn by the bill to obstruct the plaintiff in that his regular course; and that although the bill charge *generally* that the defendants have possessed themselves of all the papers and muniments of the deceased, and threaten to set up outstanding terms.

Taxed costs are given in this Court on allowing a demurrer to the whole bill.

Jones v. Jones and others - 663

12. Where the Commissioners for auditing the public accounts have, in the investigation of accounts rendered by a public functionary, disallowed some of the Accountant's charges, whereby he seeks to discharge himself of monies received, and surcharged him in other respects, this Court has jurisdiction so far as to examine and correct the principle on which that Board has proceeded in such investigation; and in a case of just complaint in that respect so satisfactorily made out as to authorize their interference to re-

quire the Auditors to review their allowances, the mode of proceeding is by *bill*, to be filed against the Attorney-General.

Craufurd and others v. The Attorney-General and others - 1

13. Whatever jurisdiction this Court may have in controlling the judgment of the Commissioners for auditing the public accounts, in regard of allowances or disallowances and surcharges, alleged to be unduly made by them in favor or to the prejudice of the Accountant, they will not interfere in a summary way on petition and motion, but the party complaining must file his bill.

Ex parte Colebrooke, Bart. - 87

14. An Accountant seeking relief in this Court from the determination of the Board of Commissioners for auditing the public accounts, should proceed *by bill*, to be filed against the Attorney-General. The Court will not interfere on motion upon a petition.

Colebrooke, Bart. and others v. The Attorney-General and others 146

15. The rule of this Court (1st February, 1792) is, that exceptions set down for argument are to be called on at the sitting of the Court, the effect of which is, that where the plaintiff does not attend to support them, they are to be struck out, and the defendant may then move, as of course, that they be over-ruled—and where the defendant does not appear, they are allowed.

Memorandum - - 208

PRIVILEGE.

(Of Witness.)

As to protection of his person from arrest, during what period it extends.

Vide WITNESS.

PROLIXITY.

Vide IMPERTINENCE.

PROMISES.

Vide PLEADING (at Law), N^o. 4.

PROMOTIONS.

Vide MEMORANDA.

PROOF.

An old grant from the Crown, "of grain, hay, and *herbage*," not shewn to have been acted upon, and under which no enjoyment or perception of the specific tithe claimed (agistment) was proved—held not to be sufficient proof of a title, in persons claiming under the grantee, to the tithe of agistment.—WOOD, B. *dissentiente*.

Scott v. Lawson and others - 267

Vide ONUS.—STOCK.

(Of Debt under Commission of Bankruptcy.)

Vide DAMAGES.

PROTECTION.

(Of Witness from Arrest.)

Vide WITNESS.

Q.

QUERIED POINTS.

1. Whether in any case public Accountants may, as matter of right, appropriate the interest arising from large balances of the public money remaining in their hands? *Seem* not.

Craufurd and others v. The Attorney-General and others - 2

2. Whether the declaration of a public Accountant's accounts by the Commissioners of Audit and the Treasury be final, and exclude the jurisdiction of the Court of Exchequer? *Seem* not.

Colebrooke, Bart. and others v. The Attorney-General and others 146

3. Vide NOTICE, N^o. 4.

R.

RECOGNIZANCE.

(Of Bail.)

Vide PRACTICE (at Law), N^o. 7.

"RECOMMEND."

(Effect of that Word in a Will.)

Vide BEQUEST.

RE-ENTRY.

(*Right of.*)

In what case will reserved by tenant for life, and with legal qualifications under a power to lease for lives

Vide LEASE.

REGULÆ GENERALES.

Vide PRACTICE (in Equity),
Nº. 6 & 15.

RENT.

(*Arrear.*)

Vide FOREHAND RENT.—LAND-
LORD and TENANT.—PLEADING
(at Law), Nº. 2.

REPLEVIN.

(*Bond.*)

Sureties in.

In what case discharged by agreement between the landlord and tenant.

Vide INJUNCTION, Nº. 1.

REPLICATION.

(*De Injuria sub.*)

Vide PLEADING (at Law), Nº. 5.

REPORT.

(*Masters'.*)

Vide INFANT.—PRACTICE (in
Equity), Nº. 13.

RESIDUARY LEGATEE.

Vide LEGATEE.

S.

SALE.

(*Of Goods Distrained.*)

May be postponed beyond the five days, by agreement between the landlord and tenant if *bonâ fide*, which is, *per se*, not matter for imputing collusion, and would not subject the goods to the execution of a judgment creditor, discharged of their liability to the landlord to satisfy him the rent due under the statute of Ann.

Harrison v. Barry, Esq. - 690

SEPARATION.

(*Deed of.*)

In what case void.

Vide HUSBAND and WIFE.

SERVICE OF PROCESS.

Vide AFFIDAVIT, Nº. 1.

**SETTING ASIDE PROCEED-
INGS.**

Vide BANKRUPT, Nº. 1.

(*Staying.*)

Vide INJUNCTION, Nº. 2.

SHERIFF.

Action against, for not paying landlord rent before removal of goods taken in execution.

Vide BANKRUPT, N^o. 1.—
LANDLORD and TENANT.

SHIP OWNER.

The owner (in *England*) is liable for money advanced to the master at his request for the necessary use of the ship, after her arrival in an *English* port; nor is the consent of the owner necessary to establish his responsibility.

Nonsuit on that ground of objection—set aside, and verdict entered for plaintiff, subject to an award of what should be found to be due for the necessary use of the vessel.

Robinson v. Lyall - 592

STAKEHOLDER.

Money deposited as a wager on the event of a foot race may be recovered from the stakeholder at any time if not paid over, by either party.

Bate v. Cartwright - 540

STATUTES.

Vide CONSTRUCTION OF.

STATUTES.

(Public.)

Edward III.

20. ch. 1 & 2. (Jurisdiction of the Court of Exchequer.) - 94

Richard II.

5. ch. 9 & 10. (Jurisdiction of the Court of Exchequer.) - 85

Henry VIII.

23. ch. 15. (Executors.—Costs.) 713

33. ch. 39. (Jurisdiction of the Court of Exchequer.) - 100

William III.

8 & 9. ch. 11. (Act for preventing vexatious suits.) - 331

James I.

4. ch. 3. (Executors.—Costs.) 713

21. ch. 1. (Bankrupts.—Lying in Prison.) - 616

Anne.

7. ch. 19. (Enabling infants seised in trust to convey.) 679

8. ch. 14. (Paying landlord rent before removal of goods taken in execution.) - 566

Ibid. - - - - 690

George II.

4. ch. 28. (Landlord and Tenant.) - 281

5. ch. 30. (Bankrupts refusing to surrender, &c.) - 616

9. ch. 36. (Mortmain Act.) 317

14. ch. 17. (Executors.—Costs.) 712

George, III.

25. ch. 52. (Commissioners for auditing public accounts.) - 146
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41. (U.K.) ch. 109. (General Inclosure Act.) - 513
43. ch. 99. (Taxes.—Re-assessing Parishes, &c.) - 594
48. ch. 75. (Remunerating persons burying dead bodies wrecked.) - 609
- ch. 149. (Legacy Duty.) 560
53. ch. . (Insolvent Act.) - 274
56. ch. 110. (Tanners.—Bark and Sumack.) - 533

STOCK.

A transfer of stock of an intestate into the name of himself jointly with that of the husband of one of two nieces, accompanied by proof of his having said in his life-time that it was his intention to give the husband the stock at his death, in consideration of affection for him and his wife, and that he had transferred it for that purpose (if not repelled by counter testimony), held to be sufficient proof of a gift of such stock—and the Court will not continue an injunction granted to restrain the husband (who had administered) from disposing of it.

Such evidence strong enough to destroy the otherwise equitable presumption, that the transferee is a mere trustee for the

transferrer, without a reference or an issue; for however weak the defendants' equity be, the plaintiff had not shewn any, and slight circumstances are sufficient to rebut the *prima facie* presumption.

George and Wife v. Howard and Wife, and the Bank of England
648

SUBPOENA.

Vide AFFIDAVIT, N^o. 1.

SURRENDER.

(*Of Copyhold.*)

In what case the Court will not order a customary heir to surrender to an alleged purchaser on motion.

Vide INFANT.

T.

TANNERS.

Vide CONSTRUCTION (of Statutes), N^o. 2.

TAXES.

Vide INSUPER.

TERMS.

(*Imposed on setting aside Proceedings.*)

Vide BANKRUPT, N^o. 1.

TESTE.

Vide EXTENT.

TITHES.

Vide "HERBAGE."

TRANSFER.

(Of Stock.)

In what case and to what extent presumptive evidence of a gift of stock.

Vide STOCK.

TRAVERSE.

Vide PRACTICE (at Law), N^o. 5.

TRUST.

1. Where a testator, having bequeathed personal estate to trustees, recommends them to lay out the money in lands, it is imperative, and raises a trust which must be carried into execution.

Kirkbank and others v. Hudson, and others - - - 212

2. *Vide* CONSTRUCTION (of Wills), N^o. 1.

TRUSTEE.

*(Not within the Statute of 7 Anne.)**Vide* INFANT.

U.

USAGE.

Perception is necessary to make an old grant of the Crown evidence of a title to particular tithes in those who, claiming under it, set it up as a defence against a vicar.

Scott v. Lawson and others - 267

V.

VENUE.

If a small part only of a plaintiff's demand be on a bill of exchange, and the bulk of the debt be for goods sold and delivered, for part of which the bill was given, the Court will not bring back the venue (which had been changed on the usual affidavit) on the ground of the action being brought upon a bill of exchange.

Greenway v. Carrington - 564

VERDICT.

1. The Court will not grant a rule for setting aside a verdict on the affidavit of the failing party, stating that one of the Jury was a relation of the successful party, and that they were in habits of friendship and intimacy together, and particularizing various instances and expressions on the part of the jurymen, of partiality and prejudice, as detailed in the body of the case.

Onions v. Naish - - - 203

2. The Court will not stay the *pos-
tea* in the hands of the associate,
for the purpose of having an
attorney's bill, on which an action
has been brought and a verdict
recovered, referred for taxation,
and to be indorsed according to
the *allocatur*, where the Jury ex-
pressly found a "verdict for the
plaintiff for the amount of his
bills, subject to taxation."

They discharged a rule which
had been obtained, to shew cause
why such an application should
not be granted, *with costs*.

Hewitt, Gent. v. Ferneley - 234

3. The Court *arrested judgment af-
ter a second verdict*—in an action
for damages, sustained by giving
credit to a person whose circum-
stances were alleged by the de-
claration to have been misrep-
resented to the plaintiff by the de-
fendant,—given *for the plaintiff*
upon a new trial, granted on the
objection that the innuendo was
not warranted by the *colloquium*,
where the action could not be
maintained unless it were.

Gainsford v. Blackford - 544

W.

WAGER.

Vide MONEY (Had and Received).

WAIVER.

Vide PRACTICE (at Law), N°. 2.

WILL.

*Vide BEQUEST.—CONSTRUCTION
(of Wills).—DEVISE.—LEGACY.*

WITNESS.

1. G. being a party in a suit referred
to arbitration, having been also
required to attend at *Exeter* as a
witness before the arbitrator, and
to bring with him certain papers
in his possession, to be read on
the reference which was appoint-
ed for the 20th *September*, left
London on the 16th, for the pur-
pose of going thither, and pur-
sued his journey *by way of Clif-
ton*, in order to procure the ne-
cessary papers which had been
left there during a previous visit,
in custody of his wife, who had
continued and was still remaining
there, and, arriving on the 17th,
employed himself in ascertaining his
papers and selecting such as were
necessary to take with him, which
occupied him, and the *professional
person whom he had procured to
accompany him to assist* in so
doing, all that day and the next;
and at five o'clock of the latter
day, and whilst he was so busied
he was arrested at the suit of a
creditor:—Held, that he was pri-
vileged during the journey, in-
cluding his stay at *Clifton*, on the
ground of the deviation being for
a necessary purpose, and the
delay no more than reasonable
for the accomplishment of it, ac-
cording to the facts stated to the
Court by the affidavits. *Gar-
row, Baron, dissentiente; absente
Richards, Lord Chief Baron.*

Richetts and others v. Gurney 699

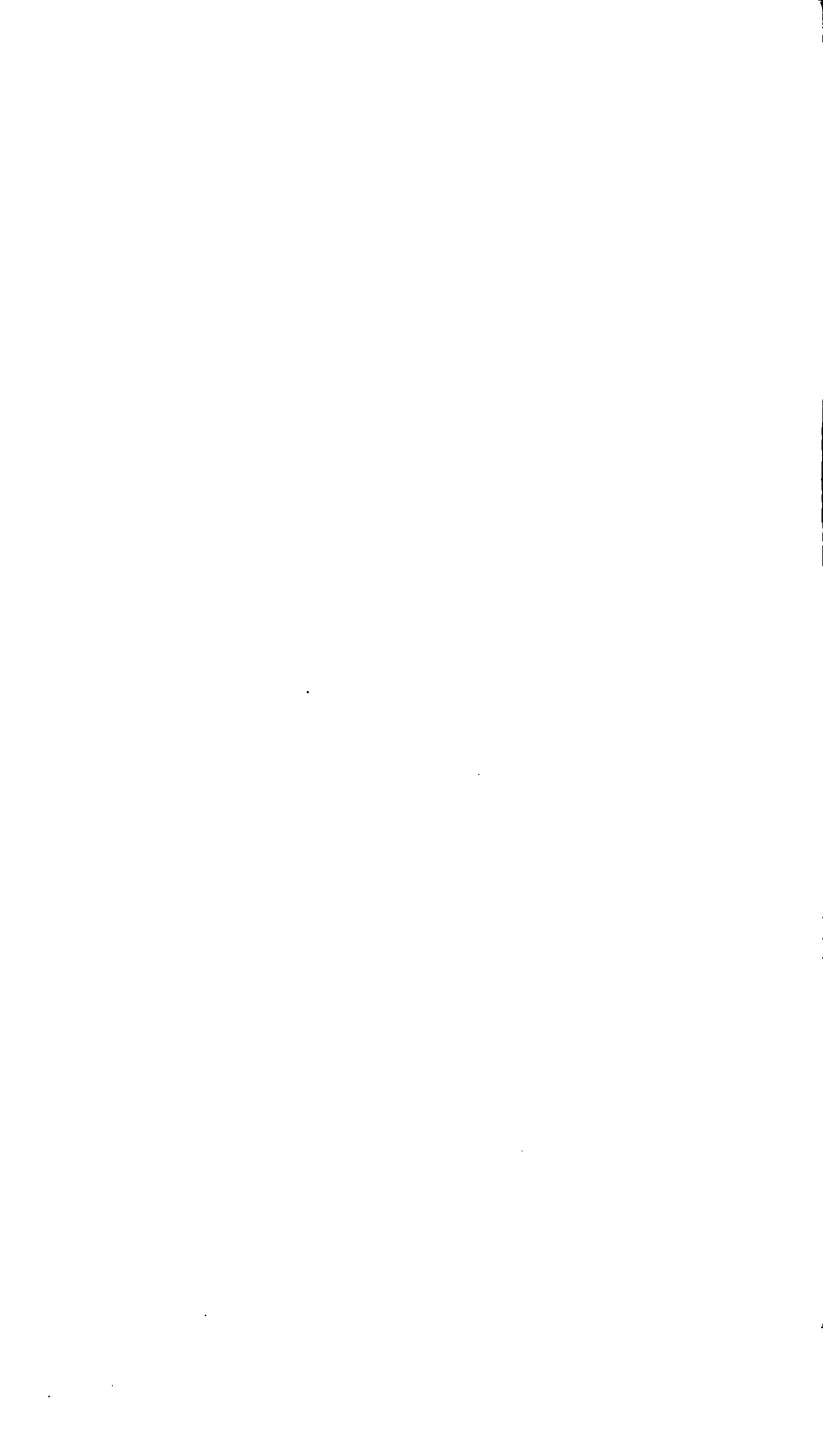
2. *Vide EVIDENCE, N°. 1.*

WRIT.

(*Of Extent.*)

Teste of new Writ.

Vide EXTENT, N°. 1.





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